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ABSTRACT

Individual rights and responsibilities are of paramount concern as courts have been increasingly called upon to define them in the wake of campus protests during the 60's. This was the theme of the conference "Higher Education: The Law and Individual Rights and Responsibilities." The central purpose of the conference was to present and discuss judicial decisions and trends and their implications for the applications to the posture of academic decisionmaking. The topics discussed by the conference speakers were: constitutional dimensions of student protest; students' right to privacy; administrators' rights and responsibilities; the rights and responsibilities of students in private institutions; academic freedom ad due process in the classroom; and constitutional rights and nonrenewal of faculty contracts. (HS)

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HIGHER EDUCATION:

THE LAW AND INDIVIDUAL RIGHTS AND RESPONSIBILITIES

Proceedings of Conference on

HIGHER EDUCATION:
THE LAW AND INDIVIDUAL RIGHTS AND RESPONSIBILITIES

Edited by

D. Parker Young

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INTRODUCTION

The decade of the sixties in America was filled with struggles surrounding individual rights. These struggles did not wholly escape the campuses of colleges and universities and indeed the campuses became the focal point of much protest; or at least it seemed that way in the eyes of much of the general public.

The struggles on campuses regarding student rights have taken the spotlight. However, each group involved in higher education has intensified its search to determine its own rights and responsibilities. These aspects of the individual, irregardless of his group, have been of paramount concern as courts have been increasingly called upon to define them.

The rights and responsibilities of individuals on campuses of colleges and universities were the concerns of the conference "Higher Education: The Law and Individual Rights and Responsibilities." The conference was sponsored jointly by the Institute of Higher Education and the Center for Continuing Education and held at the University of Georgia Center for Continuing Education June 24–25, 1971. The central purpose of the conference was to present and discuss judicial decisions and trends and their implications for the applications to the posture of academic decision-making. The issues of concern were questioned and examined, not from a philosophical or sociological point of view, but rather, in light of court decisions and precedents. The topics discussed by the conference speakers are the subject of this publication.

In discussing the constitutional dimensions of student protest Dean Yegge urged that institutions of higher learning adopt an internal order that takes into account the legitimate claims of students. The importance of understanding the grounds for student protest and for internal reflection by the institution was stressed when he stated, "It goes without saying that a court defeat for the institution and victory for students is disruptive. It seems to me then that an understanding of grounds for student protests presents the most effective and efficient method of handling, by avoidance, that protest. . . . The law has been, heretofore, the substitute for our own internal reflection. It is unfortunate that one of the most important institutions in society, the educational institution, which is dedicated to the search for truth and the development of ideas which make men free, has allowed the law to perform one of its most cherished functions."

Dean DeJarmon reviewed the current status of the law concerning students' right to privacy in both residence halls and student records. He set forth the status of the Fourth Amendment as it relates to this area and outlined the perimeters within which administrators may make decisions in this field of concern.

Dean Cowen addressed his remarks to the complex area of both the rights and responsibilities of administrators in higher education. To help the college or university administrator determine what he can and should do Dean Cowen stated, "First, he needs to know the extent of his affirmatively granted rights and responsibilities. . . . Second, he needs to know the ranges of his choices--in other words, the outer limits of action set by the state and federal constitutions. Third, he needs to consider carefully whether in a given case he ought to go to the limit of his constitutional boundary. . . . Fourth, he needs to avoid confrontations insofar as he can." He concluded by emphasizing that ". . . mechanical or rote exercise of rights and responsibilities once they are defined is not necessarily the way to right decision. Healthy doses of compassion, understanding, and respect for each person as a person, both before and after crises, are absolutely necessary if rights and responsibilities are to be exercised most effectively."

As seen by Dean Fischer, the distinction that exists between public and private institutions of higher education is losing its vitality insofar as the trend of court decisions affecting constitutional rights and responsibilities are concerned. In his opinion, a **purely** "private" college or university does not exist and he consequently questioned how much longer the public/private distinction can remain viable in the face of mounting public and judicial concern.

In my presentation I tried to set forth the need for a "free marketplace of ideas" with academic freedom, accompanied by academic responsibility, as the foundation. After pointing out some of the recent concerns for academic freedom and academic responsibilities, I predicted that in the future there would be increasing confrontations on campuses between students and faculty regarding the areas of instruction and arbitrary student evaluation. In making a plea for the inclusion of due process in academic affairs, some guidelines were offered for institutions to follow in order to afford due process without any loss of the professors' privileges or institutional autonomy.

Throughout his discussion of constitutional rights and non-renewal of faculty contracts, Mr. Buford pointed out the marked divergence of opinion among the federal appellate courts in the country concerning this topic. He stated, "At the moment the rights of a faculty member in regards to the non-renewal of his contract of employment with a public educational institution appear to depend in large measure upon the geographic location in which he finds himself." He indicated, however, that the United States Supreme Court has now agreed to rule upon this issue and when that decision is handed down it will have uniform application throughout the country.

The law is ever-evolving and not static. The papers presented here reflect this fact. The conference presentations, as well as the question and answer discussion sessions, made clear that while each college or university may well be different or unique, individual rights and responsibilities are to be considered if the institution is to remain a viable free marketplace of ideas.

D. Parker Young
Institute of Higher Education
University of Georgia

Athens, Georgia
August 15, 1971

CONSTITUTIONAL DIMENSIONS OF STUDENT PROTEST

Robert B. Yegge
Dean, College of Law, University of Denver / Denver

"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America."

Following this preamble are seven articles which establish the legislative, executive, and judicial power and function, establish the basic scope and limitations of governmental power and provide for amendments to the Constitution. And there are twenty-five amendments, the first ten of which have been designated the "Bill of Rights." The next fifteen deal with specific powers and limitations which, from time to time, have sufficiently captured the attention of the citizens of the United States to lead to constitutional amendments.

The Constitution follows, necessarily, from the Declaration of Independence of the Thirteen Colonies from the British Crown. In the Declaration it was observed, in part: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The debates which preceded the adoption of the Constitution mainly centered on the appropriate structure and limitations to secure these rights and to assure that they were not abused in the future.

In the years prior to 1776, the people of the colonies observed abuses by the British Crown in their lives, their liberty, and their pursuit of happiness, which ultimately culminated in revolution. As the Declaration states: "In every stage of these Oppressions we have Petitioned for Redress in the most humble terms. Our repeated Petitions have been answered only by repeated injury." In the years prior to 1971, we have heard the charges by some students that their rights have been violated and we hear their charges that their repeated petitions have been ignored. Some students would argue that the analogy of these times is clear. And, in certain cases, the courts have responded affirmatively to the student petitions finding in certain cases that constitutional analogies are applicable.

Without concluding that there is a real similarity between these two points in history, we should seriously ponder the question, as the British Crown did not: When petitions for redress of grievances are increasingly heard, what is the appropriate response and what is the consequence of failure to respond?

Let me not suggest that student unhappiness with university policies presents the same magnitude of problem that general citizen dissatisfaction with a system of government presented. But let the record reflect that the analogy has meaning in so far as we are alerted to self-reflection in the heretofore safe, and seemingly serene, bastille of academia. If we should assume an immovable and unchanging posture about the way in which we are delivering one of the most critical contemporary services in modern society, we might find ourselves in the position of the British Crown of the 18th century one of these days.

The thrust of student activity charging "unconstitutional" activity at our institutions of education seems to involve the spirit of the preamble of the Constitution and the amendments to the Constitution rather than the Constitution itself. Indeed, it has not been, as yet, seriously argued that each institution of education be governed in the same way as the federal government, as outlined in the twelve articles of the Constitution. There has been a suggestion that, to assure the democratic spirit of the educational institution, there should be more power invested in students: legislative, executive, and judicial. It has not been suggested, however, that the American education institution should draw on the experience of the early European university wherein student power was ultimate power.

From the preamble of the Constitution, students have argued that the present organization of the educational institution as an institution for the benefit of students who, presumably, are "the people" of the system gives students such meager representation in the power structure of the institution that justice, tranquility, and their welfare are abused.

But the thrust of student unrest and discontent seems to center mainly around allegedly violated individual rights and the petitions for redress to the courts have drawn upon principles established in the amendments to the Constitution, notably those first ten which we call the Bill of Rights. While several specific abuses of the Bill of Rights have been charged, and the petitions for redress have been fought in the courts on the constitutional grounds embodied in the Bill of Rights, the general theory or strategy of the dissenting students seems, to me, to follow by analogy from Amendments Nine and Ten; dealing with preserved rights and powers: "Article Nine--The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained to the people;" and "*Article Ten--The powers not delegated to* the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Moreover, "student power" seems to be arguing that the students are "the people" in our educational institutions and that they not only have inalienable rights, but that they also have plenary power over their educational destinies. As a part of this position, the student rights movement would argue, from the Declaration of Independence, that "all men are created equal," and that includes students. They sweeten their argument by suggesting that, at the level of higher education, they are considered sufficiently competent and mature to defend our country, and, more recently, they are granted the privilege of participating in the electoral process (at least at the federal level) at the age of eighteen. Further, they would argue, that by Amendment Thirteen they are protected by the prohibition against "involuntary servitude." Whether we of the educational institutions, or the courts in appropriate cases, would agree with these

arguments, is not the subject of these remarks. However, again, we ought to engage in some introspection when such arguments are presented, lest we find ourselves in the position of King George III some day.

The most significant uses of constitutional argument by students have centered around Amendment One (freedom of religion, speech, and press), Amendment Four (searches and seizures regulations), and Amendments Five and Fourteen in their provisions sanctifying due process of law. It is to those limited issues that the remainder of my remarks are directed.

The problem of "how to deal with student protest" can be approached from either the back (what can we do when the riot begins?) or the front (how do we prevent a riot?). I choose the frontal approach in these remarks.

Then, attacking frontally, what are the "Constitutional Rights" urged by students during protest?

Amendment I

"Freedom of religion, speech, and press––right of petition––Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

Reliance by the university community on Amendment I has been the cause of considerable litigation and the consequences of that litigation have been seen in legislative activity.

The cases brought relying on Amendment I fall into the categories of extracurricular campus activity and faculty activity. Of the former, there have been several recent cases concerning campus publication, speakers on the campus, campus organizations, demonstration and use of university facilities, attack of grooming codes, and symbolic acts. On faculty activity, there has been recent litigation on faculty discipline for non-employment activities, faculty discipline for employment activities, and faculty contract renewal questions. In the state legislatures and in the Congress of the United States, there has been legislation further defining crimes in connection with campus disorder as well as punitive legislation denying financial benefits as a result of disorders. Let us examine these situations briefly.

The courts have consistently held, recently, that the university may not censor student publications; regulations infringing speech must relate to the maintenance of order and discipline.[1] Discipline of students based upon expressions in student publications has been held invalid.[2] Generally, the courts have held that blanket "speaker bans" are invalid.[3] Limitations and regulations of speakers must meet the constitutional standard relative to prior restraint (that speakers may not be banned unless there is a clear and present danger of a serious substantive evil that would result from allowing the speaker to come to the campus).[4] Blanket rules prohibiting parades, celebrations, and demonstrations without prior approval have been held invalid[5] and the denial of admission of an individual based upon participation in non-disruptive demonstration, when that individual was not a student, has been held to violate the first amendment right.[6] There have been cases, however, where the court has upheld discipline based on inflammatory student speech and activity such

as the use of obscenity[7] or where a student has urged takeover of the university.[8] And, the first amendment does not authorize destruction of property;[9] the courts have held the right of assembly does not permit interference with operations such as free access to buildings by others.[10]

Pasting together these principles, we conclude that students must be given the right to act as individual citizens in exercising their right to protest. However, if any group of students gathers in such a manner as to disturb the public peace, excite public alarm, or do violence to any person or property, that right must fall to protect the rights of others. Frequently, it is difficult to find the line between legal and illegal forms of protest. Indeed, it takes keen and wise judgment to determine when the actions of some students violate the rights of others or disrupt the normal processes of the institution. Because it requires such skill and understanding, we are forced to understand all of the constitutional claims of students, particularly those sanctioned by the courts. One thing is clear, however: the fact that additional supervisory personnel (whether it be academic or constabulary) are required to deal with protest is not sufficient basis for concluding that student rights can be suspended.

Attempts by universities to prescribe the manner of dress or appearance have not fared well. A court has held that hair length or style is an ingredient of personal freedom and therefore admission cannot be denied based on a violation of a grooming code.[11] And courts have held that grooming rules must relate to discipline, health, morals, or physical danger.[12] The United States Supreme Court has upheld the right to wear arm bands when unrelated to any disruptive activity,[13] although the courts have upheld prohibiting use of bands and buttons during a time of probable demonstrations.[14]

Faculty has employed the first amendment in employment-related cases. The courts have, generally, protected faculty activities and statements under the First Amendment. A teacher cannot be dismissed for criticism of superiors unless his malicious statements were false or reckless.[15] The court nullified the non-renewal of a non-tenured teacher's contract based solely on his refusal to remove his goatee;[16] the court has held invalid termination of a law professor's services because he engaged in part-time employment with the OEO when other faculty members were permitted part-time employment.[17] The court reversed the revocation of a teacher's certificate based upon non-criminal homosexual activity.[18] The court has held that a state statute is invalid which denied pay to teachers who were members of subversive organizations and had knowledge of group aims but no specific intent formulated to further those aims.[19]

The activities on campuses, and the reactions of the courts (some of which are reported here) have caused a flurry of activity in the halls of Congress and state legislatures. State legislatures have revised statutes prescribing, with more specificity, crimes related to campus disorders, not all of which have yet been tested. And the United States Congress and states have enacted legislation that disallows the use of state or federal funds in support of any person convicted of crimes related to campus disturbances. Federally, such suspension of assistance includes NDEA loans, Educational Opportunity grants, student loan insurance, and participation in certain fellowship and work-study programs.

Amendment IV

"Right of Search and Seizure Regulated––The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

One of the loud cries of injustice by students has concerned what is characterized as "intrusion" by universities into the personal lives of students. The matter is particularly acute when a student resides in university facilities. And, of recent years, drug "busts" in university residences have raised questions of unlawful searches and seizures prohibited by the Fourth Amendment.

The base of the argument of students is that in loco parentis is dead. In this assertion, students are probably right. The educational institution has greatly changed in its character over the last years. The 19th century model of the education institution, if that is what is meant by normal, will never return to us. Thus, we cannot expect that the institution will ever return to the position of standing in loco parentis; or, to all around it expecting unilaterally imposed rules to be obeyed under sanction of civil death. Such benevolent dictatorship is not part of our present heritage and it should not be. The mission of the university is not merely a transmitter of existing culture, it is a creator of new culture, a breeder of new ideas, a place where things must be exciting and disturbing. Let us hope it continues to be so.

In loco parentis is not prohibited by the Constitution. Indeed, the United States Supreme Court affirmed a lower court decision just last April, that a state-supported institution of higher education could require students to live and eat in campus facilities.[20] Yet, some of the things which universities have assumed they can do, as surrogate parents of students, may have to stand constitutional tests. The question of searches and seizures, regulated by the Fourth Amendment, is one such thing.

In 1968 **Moore** vs. **Student Affairs Committee of Troy State University**[21] established that the institution has a reasonable right of inspection of a student's dormitory room where the inspection is necessary to the institution's performance of its duty to operate the school as an educational institution even though" . . . it may infringe on the outer boundaries of a dormitory student's fourth amendment rights."[22] However, in 1970, **Moore** was modified to limit the right of institutional officials to enter and search a student's dormitory room. The institution may not extend its right to assist in criminal prosecution, or, as the court said, "the right (of the institution) cannot be expanded and used for purposes other than those pertaining to the special relationship. The right conferred by reason of the special relationship must be very narrowly construed, and with such a construction the university's right to enter and search could not in this instance be delegated to the state criminal investigators."[23]

We shall hear more from the courts about Amendment IV in the educational setting.

Amendments V and XIV

Amendment V––"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Amendment XIV––". . . nor shall any State deprive any person of life, liberty, or property

without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

In these two amendments, the necessity of "due process" is emphasized as a concept deeply etched in our culture. The constitutional idea of "due process" has been interpreted, throughout history, as the human right to fairness. Students raise irrefutable arguments when they press this legal analogy. Let us look at the concept and how it applies particularly to the university setting.

Lawmen would identify two sorts of due process: substantive and procedural.

The greatest concern has been for procedural due process. Thus, university trustees and administrators have commented widely on judicial suggestions that a student must be afforded "notice" and a "hearing," attempting to invest student disciplinary proceedings with the trappings of a courtroom. Indeed, procedural standards of "fairness" are commanded. Que sera, sera. In the celebrated case of **Dixon** vs. **Alabama State Board of Education**,[24] although dicta, the Fifth Circuit Court of Appeals set down guidelines for universities to follow in student disciplinary cases, and these guidelines have since pervaded the disciplinary area of university activity more as constitutional rules than as simply the suggestions they were originally intended to be. The court suggests that such hearings should:

1. Afford notice, containing a statement of specific charges and grounds which, if proven, would justify expulsion under the college's regulations.

2. Provide a hearing which must amount to more than an informal interview with an administrative authority, and which must preserve at least the rudiments of an adversary proceeding: (a) an opportunity for the student to present his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf, and (b) a cross examination of witnesses is allowed. The student should be given the names of the witnesses against him and an oral or written report of the facts to which each witness testifies.

The area of substantive due process has not been given the same order of attention as procedural due process. This area is probably more important, in the long run. It deals with the original standards for establishing rules, of all sorts. My colleague, Professor John Reese, has identified the elements of substantive due process as:[25] reasonable relationship between the rule and the expected behavior it seeks to control; reasonable notice of the consequence of the violation of a rule; a reasonable means of controlling the discretion of a person enforcing any given rule. Reese would argue that any administrative rule of the educational institution must meet these tests to insure fairness, and consequently to insure impenetrability from interference by the courts.

To date, particularly where there is campus chaos, the manner of enforcement of legal and constitutional imperatives has been by use of the constabulary. When there is overt criminal behavior, that alternative seems warranted, in certain cases. Yet, the basic concern of students is for their civil rights, a matter into which the public authorities normally do not intervene. Students have exposed us to another remedy, in their quest to enforce rights such as those contained in the Fifth and Fourteenth Amendments. The injunction has been used,

effectively, to compel universities to behave responsibly. I suspect that the universities shall increasingly call upon injunctive process of courts, ultimately enforced by the constabulary, in requiring responsible student behavior. I find this development a healthy alternative to "martial law" on the university campus and urge its wider use, by all members of the academic community.

By this summary review of constitutional history and some of the more active provisions of the Constitution which have been argued applicable in the educational setting, I hope that you have a framework in which to consider the constitutional dimensions of student protest. It seems clear that we will continue to hear that the Constitution, whether it be by specific provision or in its general spirit, sanctions the loud and unceasing voices of students who are disturbed, for one reason or another, with the current operation of the education institution. And once these arguments are presented, they will, undoubtedly, eventually reach the courts for resolution. By and large, the courts have accepted constitutional arguments--at least in those areas that I have attempted to outline. It goes without saying that a court defeat for the institution and victory for students is disruptive. It seems to me then that an understanding of grounds for student protest presents the most effective and efficient method of handling, by avoidance, that protest.

An affirmative response by the educational establishment to constitutional guidelines defining the rights and responsibilities of all members of the university community is the "Model Bill of Rights and Responsibilities for Members of an Institution of Higher Education: Faculty, Students, Administrators, Staff, and Trustees" which was contained in the report by the Carnegie Commission on Higher Education. Its preface outlines the content of the "Bill" and says: "Members of the campus have an obligation to fulfill responsibilities incumbent upon all citizens, as well as the responsibilities of their particular roles within the academic community. All members share the obligation to respect: (a) the fundamental rights of others as citizens, (b) the rights of others based upon the nature of the educational process, (c) the rights of the institution, (d) the rights of members to fair and equitable procedures to determine when and upon whom penalties for violation of campus regulations should be imposed."

The educational establishment needs to turn up its hearing aid a bit. One of the messages that requires some reflection seems to me to be a message which was delivered by Alexander Hamilton in his 51st Federalist Paper preceding the drafting of the Constitution of the United States. You will remember when he said: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In forming a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[26]

The law has been, heretofore, the substitute for our own internal reflection. It is unfortunate that one of the most important institutions in society, the educational institution, which is dedicated to the search for truth and the development of ideas which make men free, has allowed the law to perform one of its most cherished functions. In the educational setting, it would seem to me, the law should not be mandatory, but it should suggest guidelines.

What, then, should the law, from constitutional beginnings to specific ordinance provisions, mean for the educational institution. The best statement I have been able to find is one which my colleague, Professor William M. Beaney, recently suggested:[27]

> The possible value of law, in helping to shape solutions and providing useful lessons from experience in parallel social situations, arises from its age-long concern with the defining of relationships in a wide variety of individual and associate contexts, its adoption to changes through the redefining of relationships, its handling of troublesome cases, and its concern for both the maintenance and proper exercise of legitimate authority. It must be recognized, however, that law in itself contains no panaceas; it offers more or less effective solutions to human problems, depending on the skill and judgment of the people who shape it. Neither legislatures nor courts are competent to run universities. Yet, if our educational institutions become distressed and pressures for solutions become severe, legislatures may intervene. Although unskilled in university administration, even courts, which are specialists in determining justice between men may in proper cases act to insure that justice between the students and institutions is done. The correct conclusion to be drawn is that the university should establish an internal order that takes into account the legitimate claims of students. That order should embody a spirit of justice and fairness, resulting from a recognition that rights and obligations of students should be defined after long and thoughtful consultations and deliberations. It would be a disastrous mistake if student claims were to be casually dismissed simply because the law at present provides no compulsion to act differently, and because the student has been traditionally regarded as the innocent ward of a beneficient, all-wise, and all-powerful parent.

"We, members of the academic community, in order to form a more perfect union, continue the search for truth and development of ideas and minds, establish justice, insure tranquility of environment for such endeavors, and secure our liberty to ourselves and our institutions and their posterity, do ordain and establish our own internal system of order in the tradition of the Constitution of the United States of America."

FOOTNOTES

1. **Antonelli** vs. **Hammond**, 308 **F. Supp.** 1329 (1970).

2. **Dickson** vs. **Alabama Board of Education**, 273 **F. Supp.** 613 (1969); judgment vacated (mootness), 402 **F.** 2d 515 (1968).

3. **Dickson** vs. **Sitterson**, 280 **F. Supp.** 486 (1968). **Synder** vs. **Board of Trustees of the University of Illinois**, 286 **F. Supp.** 927 (1968).

4. **Brooks** vs. **Auburn University,** 412 **F.** 2d 1171 (1969). **Smith** vs. **University of Tennessee,** 300 **F. Supp.** 777 (1969). **Stacy** vs. **Williams,** 306 **F. Supp.** 963 (1969).

5. **Hammond** vs. **South Carolina State College,** 272 **F. Supp.** 947 (1967).

6. **Saunders** vs. **Virginia Polytechnic Institute,** 417 **F.** 2d 1127 (1969).

7. **Goldberg** vs. **Regents of the University of California,** 57 **Cal. Rptr.** 463 (1967).

8. **Seigel** vs. **Regents of the University of California,** 308 **F. Supp.** 832 (1970).

9. **Evers** vs. **Birdsong,** 287 **F. Supp.** 900 (1968).

10. **Butney** vs. **Smiley,** 281 **F. Supp.** 280 (1968).

11. **Reichenberg** vs. **Nelson,** 310 **F. Supp.** 278 (1970).

12. **Calbillo** vs. **San Jancinto Junior College,** 305 **F. Supp.** 857 (1969). **Zachry** vs. **Brown,** 299 **F. Supp.** 1360 (1967).

13. **Tinker** vs. **Des Moines Independent Community School District,** 393 **U. S.** 503 (1969).

14. **Butts** vs. **Dallas Independent School District,** 306 **F. Supp.** 488 (1969). **Guzick** vs. **Debrus,** 305 **F. Supp.** 472 (1969).

15. **Pickering** vs. **Board of Education,** 391 **U. S.** 563 (1968). See also **Lafferty** vs. **Carter,** 310 **F. Supp.** 465 (1970).

16. **Braxton** vs. **Board of Public Instruction of Duval County, Florida,** 303 **F. Supp.** 958 (1968). See also **Lucia** vs. **Duggan,** 303 **F. Supp.** 112 (1969).

17. **Trister** vs. **Mississippi,** 420 **F.** 2d 499 (1969).

18. **Morrison** vs. **State Board of Education,** 82 **Cal. Rptr.** 175, 461 **P.** 2d 375 (1969).

19. **Thalberg** vs. **Board of Trustees of the University of Illinois,** 309 **F. Supp.** 630 (1969).

20. **Pratx** vs. **Louisiana Polytechnic Institute,** 91 **Sup. Ct. Rptr.** 1186 (1971); 316 **F. Supp.** 872 (1970).

21. 284 **F. Supp.** 725 (1968).

22. **Ibid.,** at p. 730.

23. **Piazzola** vs. **Watkins,** 316 **F. Supp.** 624 (1970), at p. 628.

24. 294 F. 2d 150 (1961).

25. Remarks of John Reese before a conference on "Legal Aspects of Student Institutional Relationships," October, 1968, University of Denver College of Law, Denver, Colorado.

26. Louis H. Pollak, ed., **The Constitution and the Supreme Court,** Vol. 1, p. 75, New York: The World Publishing Company (1966).

27. William M. Beaney, "Students, Higher Education, and the Law," **Denver Law Journal**, Vol. 45, No. 4 (1968), pp. 512–513.

STUDENTS' RIGHT TO PRIVACY – RESIDENCE AND RECORDS

LeMarquis DeJarmon
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"The Fourteenth Amendment, as applied to the States, protects the citizen against the State itself and all its creatures––Board of Education not excepted. These have, of course, important, delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

In 1943 when the Supreme Court of the United States[1] made this pronouncement––twenty-eight years ago––we in higher education gave it little more than a passing thought or perhaps a couple of minutes of discussion in a civics or political science class.

The student activity on the campus during the decade of the sixties supplied the impetus for a studious reassessment of the legal relationship that existed between the student and the university. At the time of **Barnette** the Fourteenth Amendment was considered as dealing with citizenship, privileges or immunities, due process and equal protection; all of which was narrowly construed. It was assumed that university officials had the power to maintain order for without it they could not guarantee education.[2] In one recent case[3] in discussing this power the District Judge said that the role of the state, however, is that of a wise parent, not the foolish or indulgent one . . .

Residence

However, for our purposes today, there are two landmark cases which gave us great concern. One was **Dixon** vs. **Alabama State Board of Education**[4] that made judicial review of university regulations acceptable and now quite frequent; the second is **Mapp** vs. **Ohio**[5] which made the Fourth Amendment's limitations against the federal government applicable to the states through the Fourteenth Amendment.

Consequently by virtue of **Mapp** the Fourth Amendment mandate that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized," is now applicable to the state and all its creatures; education not excepted.

From **Mapp** vs. **Ohio,** supra, in 1961, until 1968 the interpretation of the Fourth Amendment rights in the university context appears to have been made in only two occasions and both took the position that the amendment placed little or no restriction on the university power to inspect student areas. In **People** vs. **Kelly,**[6] a

city policeman believed that stolen goods were being kept in the defendant's dormitory room; the policeman was told that he had the power to inspect the room in case of emergency. Relying on this asserted power, the dean and the policeman entered the room and confiscated the contraband found in the room. The court held that the policeman was justified in believing that the dean had the right to permit the entry and therefore concluded that the entry was legal. The court also noted that the school had expressly reserved the right of entry in cases of emergency, and interpreted this to be an additional authorization of the implicit right to enter for disciplinary purposes.

My difficulty with **Kelly** is that in discussing the existence of this power, the court took the position that the student agreed to abide by the rules of the dormitory when he assumed residency and therefore the school could enter to enforce its regulations. This view seems to do violence to the rule of **Dixon**, supra, that entry to the school cannot be conditioned on the waiver of a constitutional right. Secondly, an "emergency" is generally thought to be an unforeseen circumstance requiring immediate attention. It appears unlikely that the mere presence of stolen goods in a room may create a circumstance requiring immediate attention, unless it can be said that less than immediate action might be considered as condonation of a wrongful act and thereby do injury to the good name of the school. Generally, in the strict criminal area, a warrantless forceful entry is usually restricted to the circumstance where the evidence may be quickly disposed of, consumed or destroyed.[7]

The second state case **People** vs. **Overton**[8] involved a search pursuant to an invalid warrant by a policeman of a junior high school locker. The court, although admitting that the locker was under Fourth Amendment protection, nevertheless upheld the search on the grounds that the supervisory powers of the school officials coupled with their charge to maintain order and discipline gave them the power to inspect the lockers and therefore they could give permission to the policeman. The appellate court stressed the point that the school retained control (the vice principal retained the combination to all school lockers) of the lockers and therefore could inspect at any time. The Appeals Court did not discuss the question of whether the school had the right to retain control, even though the lower court believed that the student should have exclusive control of his particular locker.[9] In this light the retention of the combination was for the benefit, aid, and assistance of the student rather than for the purpose of an overriding special interest of the school per se.

This brings us to **Moore** vs. **Student Affairs Committee of Troy State University**,[10] the first federal case in this area since **Mapp** vs. **Ohio**, supra, which made the Fourth Amendment applicable to the states. In **Moore** city police, after receiving reliable reports from a reliable informer that marijuana was present in the dormitory, approached the dean of men of the university with a request to search certain students' rooms. A warrantless search was made of six dormitory rooms in two separate residence halls. The dean of men accompanied the officers, a search was made of the plaintiff's room in his presence and over his objection. The search was not incident to a lawful arrest nor was any other offense committed by the plaintiff in the presence of the officers. However, the search was conducted in accordance with a university regulation granting university officials inspection rights. The school authorities did have information sufficient to have a reasonable cause to believe that the plaintiff was using his room in a manner inconsistent with appropriate school discipline. They also had enough information to amount to probable cause to believe that the conduct

was criminal. As a result of the search, marijuana was found in the plaintiff's room and he was suspended from school. The plaintiff contended that the search violated his constitutional rights and brought an action for reinstatement and to prevent the use of the property seized as evidence against him in any disciplinary proceedings. The court in upholding the search balanced the student's Fourth Amendment rights against the interest of the institution in maintaining discipline. The court readily admitted that the student naturally had the right to be free from unreasonable searches and seizures and that the school could not compel a waiver of that right as a condition precedent to admission. The test is as to the reasonableness of the regulation. In the language of the court:

> . . . its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty. In other words if the regulation––or in the absence of a regulation, the action of the college authorities––is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an "educational atmosphere" then it will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students.

Moore is significant in that it attempted to introduce a legal basis for the search which the previous cases had omitted. It distinguished between searches that are reasonable and therefore permissable and those searches that were unreasonable and therefore prohibited. **Moore** drew the constitutional boundary line between the right of the school authorities to search on the one hand and the right of the dormitory student to his privacy on the other hand as being whether the school authorities have reasonable cause to believe that the student is using the dormitory room for a purpose which is illegal or which would otherwise seriously interfere with campus discipline.

The main thrust of the Fourth Amendment is to maintain inviolate the privacy of the places an individual uses and upon which he relies as being limited to his use. Since the protection goes to privacy rather than to property, **Moore's** emphasis on nature of the intrusion, rather than the status of the person or the ownership of the premises seems to be a correct one.

Since **Moore** several additional cases have been brought. One is of particular significance since the court's opinion was written by the same judge that wrote the opinion in **Moore.** In **Piazzola and Marinshaw** vs. **Watkins,**[11] the Dean of Men of Troy State University was called to the office of the Chief of Police where he was told that two narcotics agents had information that marijuana was in the dormitory and they desired the university's cooperation in searching several rooms. The names of the students whose rooms they desired to search were supplied by an informer whose name was never revealed. Piazzola and Marinshaw's rooms were searched without warrant and without their consent, but present during the search were the two narcotic agents, campus security officers, and a residence hall counselor. The University had in effect the same regulation that it had in **Moore.** Marijuana was found and the students arrested, criminally prosecuted and convicted. Subsequently, the search was challenged in a petition for habeas corpus. The court invalidated the search on the basis that the state lacked "probable cause" and that the insufficiency could not be cured under the relaxed standards of **Moore. Moore** involved a university initiated search for school purposes while **Piazzola** involved a police search for

criminal purposes, and the fact that the university officials agreed to the search was inconsequential.

The same distinction was held in **Keene** vs. **Rodger**[12] where the court upheld a search that was conducted "solely for the purpose of enforcing the academy rules and regulations and for insuring proper conduct and discipline on the part of cadets." The key to the decision is that the search was not instigated or conducted by federal or state law enforcement officers, but was conducted solely to determine if there had been a breach of an academy rule.

One problem occurs with the courts sanctioning the use of the institution's supervisory authority to conduct a search under relaxed cause and the subsequent admission of the fruits of that search in later criminal proceedings. This problem is suggested by the court's statement in **Keene** vs. **Rodger**, supra, that the case fell clearly with the rule enunciated in **United States** vs. **Cole.**[13]

In **United States** vs. **Cole,** supra, an administrative officer of a Job Corp Center at Bar Harbor, Maine, who possessed neither the status nor any of the powers of a law enforcement officer, and did not act in cooperation with any law enforcement officer, searched the suitcase of a student or corpsman of the center who had returned late from leave. The search revealed a quantity of marijuana. This was turned over to a law enforcement officer and the student or corpsman was convicted. He challenged the admissibility of the evidence in the criminal proceedings. The court upheld the search on the grounds that:

> It cannot be seriously maintained that the object of the search was to procure evidence of a crime or in any way to facilitate an anticipated federal prosecution . . . the investigation was conducted solely for the purpose of preventing the introduction of forbidden articles into the center.

The thrust of this opinion does not appear to be consistent with the rationale of **Moore, Piazzola,** or **Keene**, supra. It is interesting to note that at an earlier date the court has consistently forbidden the use of evidence illegally obtained by one source that had been handed over, on a silver platter so to speak, to another source for prosecution.[14]

The major distinction between this rule and the **Coles** discussion is that because of the relaxed standard (reasonable cause to believe as against "probable cause") the search in **Coles** was reasonable and thus not violative of the Fourth Amendment. On the other hand, had this search, under its circumstances, been conducted by law enforcement officers, it would have been violative of the Fourth Amendment. **Moore, Piazzola** and **Keene**. To permit evidence gathered by a search pursuant to the lesser non-criminal standards of **Moore** to be used in a criminal proceedings, which requires a higher standard for search, appears to be a misinterpretation that effectively limits Fourth Amendment protection unnecessarily. The ghost of the "silver platter doctrine" still walks the land, somewhat shrunken in size but yet capable of much mischief.

The Fourth Amendment protects the individual's privacy, rather than places and things; consequently, where the seal of privacy is broken, the nature of the intrusion should be subject to close scrutiny, the use of the property seized should have close relation to reason that justified the intrusion.

Records

The Fourth Amendment also protects one in his papers and records. Thus far there has been little litigation in this area, but yet it is an area in which educators should be greatly concerned and cautious. Colleges and universities request a great deal of information about prospective students. This information may include grades, class standing, class averages, test scores, college entrance examinations, American College Test scores, and even teacher evaluations. Employers frequently request of colleges and universities information from the student's records regarding his competence for employment. In this day and time, this may be a dangerous area. Title VII of the Civil Right Act of 1964, Section 703 (a) declares it to be an unlawful employment practice to fail or refuse to hire an individual because of his race, color, religion, sex or national origin except where such is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[15] This type of law would make it dangerous for college and university personnel, sending out transcripts which contain photographs, and information on religion, race, nationality and origin of the student.

The Joint Statement on Rights and Freedoms of Students[16] has attempted to establish safeguards in this area through its Article III.

Article III, Student Records

> Institutions should have a carefully considered policy as to the information which should be part of a student's permanent educational record and as to the conditions of its disclosure. To minimize the risk of improper disclosure, academic and disciplinary records should be separate, and the condition of access to each should be set forth in an explicit policy statement. Transcripts of academic records should contain only information about academic status. Information from disciplinary or counseling files should not be available to unauthorized persons on campus, or to any person off campus without the express consent of the student involved except under legal compulsion or in cases where the safety of the person or property is involved. No record should be kept that reflects the political activities or beliefs of the student. Provisions should also be made for periodic routine destruction of non-current disciplinary records. Administrative staff and faculty members should respect confidential information about students which they acquire in the course of their work.

This type of policy establishes some safeguards for the university. The law of libel and slander extends a qualified privilege to information given, if made in good faith, by one having a duty in the premise to one who has a definite interest therein. Good faith also required that rumor or gossip unkind to a student not be repeated, except when there is a positive duty to report it.[17] Illustrative of such duty is where a student, rumored to be dishonest, is proposed to be employed in a position involving handling a cash register. In such an instance the information should be labeled as rumor or hearsay and reported only to the appropriate person having a definite interest therein. In **Everett** vs. **McKinney,**[18] the court held that the qualified privilege extends to all communications made bona fide upon any subject matter in which the party communicating has an interest or in reference to which he has a duty to a person having a corresponding intent or duty.[19]

There is one lower court case that raises an interesting question of the situation in which the interests are conflicting. Then what? In **Creel** vs. **Brennan,** Civ. Action 3572 (Super. Ct. Androscoggin County, Maine, May 8, 1968), the plaintiff, a high school student in good standing in Connecticut, during his senior year applied to and was rejected by four colleges, Bates College in Maine being one of them. It appears that some of the high school personnel had included in the materials sent to the college evaluations that were neither honest nor fair. The parents filed suit against the New Haven School Board to compel the superintendent to write the colleges and withdraw all of the stated evaluations. To support the Connecticut action, another was brought in Maine to compel Bates College to produce from its files the evaluations that had been sent to Bates. So the motive for bringing the Maine suit was to uncover evidence which could be used against the high school officials in Connecticut. Here the interest conflicts. On the one hand there is an assumed need for confidence and candor between the evaluator and the institution seeking the evaluation. On the other hand, there is the interest of the student in protecting himself from unfair, dishonest, or even malicious evaluation.

The Maine Court allowed the subpeona since they could find no authority for the privilege status of the information. The case was not appealed so it is not precedent for other cases. Nevertheless, the problem is an acute one for the more we retrench from purely objective criteria the more reliance must be put on subjective information supplied by school officials and other persons.

This problem also applies to files containing information about a student which is "confidential" from him and which is used for graduate and professional school admissions and future employment. He may be seriously prejudiced by false or derogatory information in his file about which he knows nothing. Perhaps the solution is, that before any evaluation is sent the student should be informed of everything that is being said about him, and if he does not wish the information disclosed, he can at that time request that the evaluation not be made at all.

At the present time, this seems to be the status of the Fourth Amendment in records. The outer limits of these protections must await future developments at a future date.

But in spite of the uncertainties, we in higher education must always remember the basic purpose of the university--that is developing the mutual process of teaching and learning--and towards that goal and in pursuit of that purpose we must within the constitutional framework proceed toward this end with our vision undimmed, our faith unaltered, and our courage unafraid.

FOOTNOTES

1. **West Virginia State Board of Education** vs. **Barnette,** 319 **U. S.** 624, 637 (1943).

2. See: **Gott** vs. **Berea College** (Ct. of App. Ky.) 161 **S. W.** 204 (1913); **Barker** vs. **Hardway,** 283 **F. Supp.** 228, 235, (S. D. W. Va. 1968).

3. **Cordona** vs. **Chonko,** No. 69–293 (N. D., Ohio 1970).

4. 294 **F.** 2d 150 (5th Cir 1961) cert. denied 368 **U. S.** 930 (1961).

5. 367 **U. S.** 643 (1961).

6. 195 **Cal. App.** 2d 72, 16 **Cal. Rptr.** 177 (Ct. App. 1961).

7. **Ker** vs. **California,** 374 **U. S.** 23 (1963).

8. 20 **N. Y.** 2d 729, 229 **N. E.** 2d 596, 283 **N. Y. S.** 2d 22 (1967).

9. See: 51 **Misc.** 2d 140; 273 **N. Y. S.** 2d 143 (App. Div 1966).

10. 184 **F. Supp.** 724 (M. D. Ala. 1968).

11. 316 **F. Supp.** 624 (M. D. Ala. 1970).

12. 316 **F. Supp.** 217 (D. Me. 1970).

13. 302 **F. Supp.** 99 (D. Me. 1969).

14. See: **Byars** vs. **United States,** 173 **U. S.** 28 (1927) where state officers illegally searched for evidence to turn over to federal officers.

15. For a similar statute, see Page's **Ohio Revised Code,** Sec. 4112.02.

16. See: **College Law Bulletin,** Vol. 11, No. 6, February 1970, p. 43, 44.

17. **Forsythe** vs. **Durham,** 270 **N. Y.** 141, 200 **N. E.** 674 (1936).

18. 195 **Mich.** 649, 162 **N. W.** 277 (1917).

19. See also **Kenney** vs. **Gurley,** 208 **Ala.** 623, 95 **So.** 2d 34 (1923).

ADMINISTRATORS' RIGHTS AND RESPONSIBILITIES

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I had, until fairly recently, a distinct impression that not much serious thought had ever been given to the subject of the rights and responsibilities of university and college administrators. It had been generally assumed by faculty, students, and the public at large--it was customary to believe--that these rights and responsibilities paralleled, as appropriate, the rights of parents with respect to their children and the rights of property owners or the managers for property owners with respect to the operations of the university.

In recent years, in times of protest, such an easy approach has been no longer possible, and all senior administrators have had to face questions concerning their obligations and the limits of their authority in meeting these obligations.

No doubt custom will continue to play a role in defining the limits of the rights and responsibilities under discussion. But as has happened in the recent past, custom will continue to be challenged. Both the substance and procedural aspects of it will have to meet the necessary legal tests, at least insofar as public institutions are concerned.

In recent years we, of university and college communities, have found ourselves, with respect to students, increasingly in adversary positions rather than in loco parentis situations. More and more we have had to defend what we do, not only as a matter of sound administration but also as a matter of law.

To illustrate, there remain many, many parents who are displeased with the general abandonment of the in loco parentis concept. It makes no difference that much of that abandonment may have been required as a matter of law, nor does it make any difference that the abandonment was, in a practical sense, necessary to the continued calm and efficient operation of the university. Parents by and large want their "children," and I use the word advisedly, albeit loosely, to be subject at the university to the same supervision that the parents **assume** their children would have at home, or perhaps the proper statement is that they **hope** they would have at home. So, however illogical it may be, we are faced with a continuing problem.

In defining the rights and responsibilities of university and college administrators, we should start with the written law of the jurisdiction with which we are concerned. This will be

found perhaps in the constitution of the state with implementing statutes; perhaps statutes alone will define these rights and responsibilities.

But even after we have located this written law, we are by no means through. Another aspect of the easy thinking in which we have all indulged is the tendency to believe that all we have to do is to look up the statutory authority of a college or university administrator and act in accordance with the provisions of this law. But this is not so! There are few statutes which cannot be subjected to reasonable attack on the ground of basic meaning or application in a particular circumstance.

Assuming for the moment, and improperly, that a reading of a statute will reveal adequately the scope of the statute, such a reading still does not answer the questions of the limitations on all state authority, some of which our authors have previously discussed and which are imposed by both the federal and state constitutions. Here too, of course, there has been a tendency to believe that all we have to do is to ascertain these limitations and to act accordingly; ignoring what should be obvious that the phrases "due process" and "equal protection," not to mention "freedom of speech and press" and "searches and seizures" which are found in virtually every constitutional document are extremely difficult of interpretation. It also ignores the fact that what you and I might consider to meet the requirements of "due process," "equal protection," "freedom of speech or press," and "illegal searches and seizures," a student might very well believe to be a denial of his constitutional rights.

Obviously, it is not that easy. There are restraints, and additional interpretations which are necessary. In the end ultimately, those interpretations must come from the courts.

In a way, we all know this is what happens in our system, but sometimes it is not evident why it should. Why should a judge or group of judges be able to construe constitutional and statutory provisions and to say whether particular statutory provisions or administrative regulations of public institutions are valid or invalid? The answer simply is that within our system of government the courts are established to determine whether in a given disputed situation particular rights, duties and obligations of persons have been violated or denied. In the process of determining whether or not they have been denied, it must be determined whether or not they exist at all. Take one of today's common examples, suppose that a college or university undertook, by regulation, to limit the hair length of its male students to the tips of the ears. Such a regulation should be relatively easy to understand, and factually it should be relatively easy to determine whether a particular student was in violation of the regulation or not. But the broader question is whether the university has a right to promulgate such a regulation, and of course, if it does not have such authority the student could not be guilty of violating the regulation. So, if a student should feel strongly enough about it, he would seek relief from the courts on the ground that such a regulation denied him due process or equal protection of the law, or both, or perhaps even denied him his right of symbolic free speech. If the court agreed with the student, then it would enjoin enforcement of the regulation on the ground that it was unconstitutional. If it disagreed, the student would be denied relief, and the university presumably would be free to impose an appropriate sanction.

This situation has led to relatively frequent comments in a variety of forms, from persons,

including judges, to the effect that "law" is what the judges say it is. Obviously, such a statement is not literally true, but there is enough truth in it to make it plausible. Because our system, of necessity, does charge our courts with the responsibility of construing constitutional and statutory provisions, at times it does appear to some that such provisions mean only what the judges say they mean.

Additionally, the courts in the Anglo-American legal system have had the responsibility of formulating what we call the common law. The common law, by and large, is based upon custom. Over a long period of time people believe or evidence a belief that certain conduct is acceptable and certain other types of conduct are unacceptable. The process is painfully slow, which, incidentally, has brought legislatures into dominance in law making; but, nevertheless, when the time comes when a court translates custom into enforceable law, here too, the charge can be made that the law is what the judges say it is.

To return to my principle theme, there is not much by way of affirmative limitation in the law respecting college and university administrators' rights and responsibilities. It is the negative limitations set forth elsewhere in the constitutions of the United States and of the states which, during the sixties, came into prominence as effective limitations on the rights, if not the responsibilities, of administrators of state supported universities and colleges.

In this time of development the critical areas have been those of free speech, complicated by demonstrations and other overt acts, and the procedural obligations of the university in the administration of discipline.

These problems, of negative limitations on rights and responsibilities, have not until relatively recently received a great deal of attention. The traditional, if arch reactionary, point of view was expressed in 1891 as follows:

> By voluntarily entering the university or being placed there by those having the right to control him (the student) necessarily surrenders very many of his individual rights; how his time shall be occupied, what his habits shall be, his general deportment, that he shall not visit certain places, his desires to study and recreation--in all these matters and many others, he must yield obedience to those who for the time being are his masters.[1]

In 1913 another judge took occasion to say:

> College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the students, and we are unable to see why to that end they may not make any rules or regulations for the government or betterment of their pupils that a parent could for the same purpose.[2]

In 1924, the same general feeling was evidenced as follows:

> As to the mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis, and in their discretion may make any regulation for their government which a parent can make for the same purpose.[3]

As late as 1959, the United States Court of Appeals for the Second Judicial Circuit in **Steier vs. New York State Education Commissioner,**[4] expressed a view similar to that which the court held in 1891. One judge in the majority stated:

> Education is a field of life, reserved to the individual state. The only restriction the federal government imposes is that in their educational program, no state may discriminate against an individual because of race, creed, or color.

The other judge in the majority thought that the federal courts had jurisdiction in the particular case but that Steier's constitutional rights had not been denied. In his view, the student was indeed constitutionally free to say what he pleased on this issue, but he was not free to say it as a student at Brooklyn College. He had been admitted to Brooklyn College "not as a matter of right, but as a matter of grace, after having agreed to conform to its rules and regulations."[5]

Charles Wright in his superb lectures on "The Constitution on the Campus" suggested that the supporters of the old order would justify their results on the ground that university administrators:

> . . . were indeed paragons of fair play, that they leaned over backwards to give the student every possible doubt and to act only in his best interest, but that it was no business of the court to look into these matters to see just how fair the university has actually been. To support their position, the administrators could draw on the whole grab bag of conceptualism: that attendance at the university was a privilege rather than a right, that the university stood in loco parentis to the students; or that the vague rules that are commonly found in university catalogues that a student could be dismissed whenever the institution thought this advisable constituted a contract that the student had accepted.[6]

But times change, and finally in 1969, the United States Supreme Court had occasion to lay to rest the traditional doctrine that in loco parentis exempted state supported institutions from the limitations of the federal constitution. In the famous **Tinker**[7] case, the Court held that First Amendment rights are available to teachers and students subject to application in light of the special characteristics of the school environment.

As the prior authors have indicated, we now have a substantial body of decisional law in this area. How much more there will be is a matter of conjecture. We will always have statutes to construe, but as the trend of decisions becomes more clear, there may be fewer cases actually litigated. The same general comment pertains to the constitutional limitations as well. These must be observed. As the Court makes clear what the constitution permits and prohibits, there will, in all probability, be fewer and fewer cases actually litigated since lawyers will be able to predict with greater certainty what the courts, in given situations, will do.

Where administrators' rights and responsibilities are litigated, it seems clear that the courts will continue to recognize that these rights and responsibilities are very broad, and indeed, some limitations which may seem to have been established by the cases of the sixties may well turn out not to be as limiting as was first thought. For one reason, the United States Supreme Court now appears reluctant to over-involve itself in cases which are essentially local in nature. This means that whatever these rights and responsibilities are in particular areas will be determined by lower court judges who, in turn, may be influenced by public opinion perhaps to a greater degree than would be the United States Supreme Court. To illustrate, consider **Guzick** vs. **Drebus,**[8] in which it was held that a student who had been suspended for wearing an anti-demonstration button, contrary

to the school's regulations, had not had his constitutional rights violated. The court ruled that the record demonstrated abrogation of this particular regulation would seriously subvert the high school as a place of education and would amplify serious disciplinary problems and exacerbate tense racial situations. It was held specifically that a general rule applicable to all buttons did not violate the rule of **Tinker** vs. **Des Moines.**[9]

It may well be that the difference in the result in the two cases can be explained by the state of the record in each. In **Tinker**, apparently there had been no demonstration that the wearing of the black armband would be disruptive. In **Guzick**, apparently there had been a showing that the wearing of symbols tended to interfere with the educational process. On the other hand, the difference in results may be explained by the fact that hypothetically, at least, the people had demonstrated their lack of patience with the violation of school regulations and the court had seized upon a technical distinction to reach a different result in harmony with public opinion.

All this illustrates the point that, although we can find constitutional and statutory provisions and regulations defining the rights and responsibilities of administrators, we are not certain of their full implications unless and until they have been construed by the courts, and their validity under other provisions of constitutions determined.

With this background, let us attempt to deal more specifically with the rights and duties of university and college administrators. I have suggested that each public institution exists because the people of the state have, by constitutional or statutory provision, authorized its existence and charged it with certain responsibilities.

To take the University System of Georgia as an example, there are constitutional and statutory provisions establishing the University System of Georgia to be operated by a Board of Regents which has extremely broad but generally stated powers.

The University of Georgia itself preceded in time the establishment of the University System, which was in a sense superimposed on the University, but it is clear that the Regents of the System have virtually total authority over the University and all the constituent branches of the System. Section 2–6701 of the Georgia Constitution provides in part:

> There shall be a Board of Regents of the University System of Georgia and the government and control of the University System of Georgia and all of its institutions in such system shall be vested in said Board of Regents of the University System of Georgia.

Further the Code of Georgia in Section 32–113 provides:

> The management and government of the University of Georgia and all its branches named in Section 32–103 are vested in the Board of Regents.

And finally in Section 32–121 the Georgia Code provides in part:

> The Board of Regents shall have power: (1) to make such reasonable rules and regulations as are necessary for the performance of its duties; (2) to elect or appoint professors, educators, stewards or any other officers necessary for all the schools in the University System as may be authorized by the General Assembly, to discontinue or remove them as the good of the System or any of its schools

> or institutions or stations may require and to fix their compensation . . . (4) to exercise any power usually granted to such corporations necessary to its usefulness which is not in conflict with the constitution and laws of this state.

The statute seems to give unlimited authority to hire and fire staff members, but there are limits. For example, in **McConnell** vs. **Anderson,**[10] it was held that the due process clause of the Fourteenth Amendment to the United States Constitution bars a state university from refusing to hire a qualified librarian solely on the basis of his public announcement that he is a homosexual. This may well not involve an appropriate application of the Fourteenth Amendment, but it does evidence the point that state colleges and universities are subject to constitutional limitations.

In teacher "discharge" proceedings it has recently been held that:

> . . . the interest of the non-tenured teacher in knowing the basis of his non-retention are so substantial that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation in some detail the reasons for non-retention together with access to evaluation reports and the teacher's personnel file.[11]

Given this broad but not unlimited power, the Regents of the University System in turn have delegated certain rights and responsibilities basically to the President of the University. Section 3 of the Proposed Statutes of the University of Georgia set forth the powers and duties of the President in part as follows:

> (a) . . . he shall have authority to exercise such powers as may be necessary to the proper management in control of the University. . . .

For all practical purposes then, full and complete authority rests with the President of the University, subject to the Board of Regents. At the University, and I believe this is typical, there are very few rights which have not been conferred upon the administration. A university, obviously, is not a government of enumerated powers such as is the federal government, at least in theory. By and large, as I understand it, the President of this University and the chief executives of similar institutions have those powers necessary and proper, without precise definition, to further the purposes of the institution. Until recent times, there had been general acquiescence in the exercise of almost full authority, and so, even today, there is not a substantial body of law with respect to the outer limits of rights and responsibilities.

Indeed, when called upon to do so, the courts have expressly or by implication recognized very broad affirmative authority. For example, in **Tinker** vs. **Des Moines,**[12] Mr. Justice Fortas who wrote the principal opinion said in part:

> The court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials consistent with fundamental, constitutiona safeguards to prescribe and control conduct in the schools.

In the same case, Mr. Justice Harlan speaking in dissent said in part:

> School officials should be accorded the widest authority in maintaining discipline and good order in their institutions.

And in **Esteban,**[13] then Judge, now Mr. Justice, Blackmun stated in part:

> We agree with those courts which have held that a school has inherent authority to maintain order and to discipline students.

Additional illustrations could be produced almost without limit.

Paynter vs. **New York University,**[14] while involving a private school, also emphasized the broad powers possessed by University administrators. It was said in part:

> Private colleges and universities are governed on the principle of self-regulation, free to a large degree from judicial restraints, and they have inherent authority to maintain order on their campuses. In light of the events on the defendant's campus and in college communities throughout the country of May 4–5, 1970, the court erred in substituting its judgment for that of the university administrators and concluding that the university was unjustified in suspending classes for the time remaining the school year prior to the examination period. Moreover, while in a strict sense a student contracts with a college or university for a number of courses to be given during the academic year, the services rendered by the university cannot be measured by the time spent in a classroom. The circumstances of the relationship permit the implication that the professor or the college may make minor changes in this regard. The insubstantial change made in the schedule of classes did not permit a recovery of tuition. We conclude that substantial justice was not done between the parties 'according to the rules and principles of substantial law.' (New York City Civil Court Act, Section 1807).

On the other hand, in **Cordova** vs. **Chonko,**[15] it was held that the due process clause of the Fourteenth Amendment barred an Ohio high school principal's suspension of a student who had refused to cut his long hair in accordance with the principal's rule which had never been officially considered by the Board of Education even though long hair was merely a whim of the student and not an expression of opinion. Paying at least lip service to the necessity of maintaining discipline, the court said:

> The importance of maintaining discipline as part of the educational process in schools cannot be overemphasized, but the element of an unreasonable arbitrariness in disciplinary matters is also important.

Similar authority exists also with respect to academic matters. In **Militana** vs. **University of Miami,**[16] wherein a student had sued to compel his graduation even though he had been dismissed for academic deficiency, the court held that where the record showed that the defendant university had not acted in a prejudicial or arbitrary manner in discharging a medical student for failure to meet academic standards, the plaintiff's complaint should be dismissed.

My guess is that despite an occasional case like **Cordova**, there will be continuing pressures upon administrators to "tighten up" on dissident or "different" faculty members and students. They will come from various constituencies, perhaps most importantly the legislatures, and administrators will react to these pressures.

There will also be pressures from militant groups––faculty, students, outsiders for greater permissiveness; the administrator will find himself continuing on the horns of a

dilemma. But I suggest, he will continue to have support from the courts in the definition and exercise of his rights and responsibilities. This imposes a substantial burden of self-discipline on the part of these administrators.

Charles Wright in his "The Constitution on the Campus" has summarized the situation as follows:

> These are unhappy times for those persons who are charged with the governance of great universities. They are required to make agonizingly hard decisions on matters that may involve even the survival of the university as a free institution dedicated to a higher purpose. In making these decisions, the administrator will not long preserve his sanity if he must constantly look over his right shoulder to see what the legislators will think and then look over his left shoulder to determine how the militant students will react.[17]

What can and should the college and university administrator do? First, he needs to know the extent of his affirmatively granted rights and responsibilities. Normally this presents no serious problem; he has ample affirmative authority. Second, he needs to know the ranges of his choices--in other words, the outer limits of action set by the state and federal constitutions. Third, he needs to consider carefully whether in a given case he ought to go to the limit of his constitutional boundary. Will something less drastic be a better solution? Fourth, he needs to avoid confrontations insofar as he can. Professor Wright concludes his analysis by saying:

> The long term interests of the university requires that it do what is right regardless of what immediate consequences may be feared. In forming that judgment the administrator now has a valuable guide in the Constitution of the United States.[18]

I would emphasize, as would Wright himself, that mechanical or rote exercise of rights and responsibilities once they are defined is not necessarily the way to right decision. Healthy doses of compassion, understanding, and respect for each person as a person, both before and after crisis, are absolutely necessary if rights and responsibilities are to be exercised most effectively.

FOOTNOTES

1. **North** vs. **Board of Trustees,** 137 **Ill.** 296, 306 (1891).
2. **Gott** vs. **Berea College,** 256 **Ken.** 376 (1913).
3. **Stevens University** vs. **Hunt,** 88 **Fla.** 510 (1924).
4. 271 **F.** 2d 13 (1969).
5. **Ibid.**

6. Wright, Charles, "The Constitution on the Campus." **Vanderbilt Law Review.** Vol. 22, **No.** 5, (October 1969) 1027–1088.

7. **Tinker** vs. **Des Moines Independent Community School District,** 393 **U. S.** 503 (1969).

8. 431 **F.** 2d 594, Cert. denied (1970).

9. **Op. Cit.**

10. 316 **F. Supp.** 809 (1970).

11. **Drown** vs. **Portsmouth School District.** 435 **F.** 2d 1182 (1970).

12. **Op. Cit.**

13. **Esteban** sv. **Central Missouri State College,** 415 **F.** 2d 1077 (CA8, 1969).

14. **Paynter** vs. **New York University,** 319 **N. Y. S.** 2d 893 (1971).

15. **Cordova** vs. **Chonko,** 315 **F. Supp.** 953 (1970).

16. **Militana** vs. **University of Miami,** 236 **So.** 2d 162, Cert. denied (1970).

17. **Op. Cit.**

18. **Op. Cit.**

THE RIGHTS AND RESPONSIBILITIES OF STUDENTS IN PRIVATE INSTITUTIONS: THE DECLINE AND FALL OF AN ARTIFICIAL DISTINCTION

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If you have come here this evening to learn the exact ways in which private colleges and universities may treat their students differently from their public counterparts, then I am afraid you are going to be disappointed. I realize that it is traditional for private colleges to have controls over their students which have been denied to public schools; but, I believe this distinction is losing its vitality. Indeed, presenting an exhaustive study of the **current** legal status of students' rights on private college campuses is, in my opinion, a little like preparing the definitive work on the law of public school segregation the day before the **Brown** decision.[1]

For it is my belief that the law has been building inexorably toward a major change in the legal status of students attending private institutions. I would be remiss in speaking on this topic if I did not do my best to indicate how I believe this change will occur, and what it will mean to the affected institutions.

The origin of the heretofore rather privileged nature of the relationship between private schools and their students is constitutional in character. The Fourteenth Amendment to the United States Constitution reads in part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[2]

The exact mandate of this clause will be discussed later, but it is important at this point to note that the prohibition is directed at **the states.** Thus, it has been dogmatic learning in American Constitutional law since the **Civil Rights Cases** of 1883[3] that the "due process" and "equal protection" clauses of the Fourteenth Amendment prohibit only those activities which involve "state action."[4] The actions of private citizens and private associations are not generally considered to be within the ambit of this prohibition.[5]

It is this requirement of "state action" which has permitted private colleges and universities greater freedom in dealing with their students than that accorded public institutions. Historically, public institutions have tended to

be regarded as instrumentalities of the state, whereas private institutions have not.

Thus in 1926, Syracuse University was allowed to dismiss a female student in her final year of study for not being a "typical Syracuse girl."[6] No charges were brought, there was no process; she was simply dismissed. The University justified her dismissal by relying upon its contractual power "to safeguard . . . its moral atmosphere. . . ." The court assumed that the university officials had a good reason for her dismissal, but never inquired what that reason might be. Nor did the court question the procedure involved. Because Syracuse was a private institution, the court viewed the student-university relationship solely as one of contract, conferring upon the University a virtually unfettered power to dismiss students.

This case seems strangely out of date today. A similar action taken on the same campus today would have the makings of a good riot, or, at the very least, a strike or boycott.

Part of the reason for this changed reaction is, of course, a shift in our society's attitude toward authority and failure. But the trend has been stimulated too by a measurable increase in the value of, and aspiration for, a higher education; and a liberalization of the relationship between private colleges and their students——led, in fact, by some of the nation's best-known private schools. Finally, the reaction is in part the result of the courts' increased willingness to scrutinize the "private" nature of institutions involved in summary disciplinary procedures, and the nature of the "contract" which permits them this latitude.

In recent cases, it is rare indeed for the courts to treat student-institutional matters as summarily as did the **Anthony** court. Rather, contemporary courts take laborious pains to assure themselves and their critics, that (despite a number of quasi-public connections) private colleges have once again escaped behavior which might be classified as "state action." Consequently, they have maintained their option to discipline students free from court interference.

A recent example of this type of cliff-hanging judicial restraint is the case of **Greene** vs. **Howard University.**[7] In this ex parte proceeding several students were dismissed by Howard University for their roles in certain campus disruptions. The students protested that they had not been accorded their constitutional right to notice and hearing under the rule in **Dixon** vs. **Alabama State Board of Education,**[8] and demanded readmission. Perhaps the **Greene** case is better referred to as a non-case, however, because——with a notable fact pattern before it——the court did anything but face the issue squarely. In a unanimous opinion, the court first held the case was mooted by the fact that the student-plaintiffs had either been readmitted to Howard University or had obtained admission to other schools. Having thus relieved themselves of any need to deal seriously with the **real** issue in the case, that of "state action," the court found that Howard University was a "private corporation" (although more than 50 percent of its annual operating budget was in the form of a direct appropriation from Congress) and consequently not subject to the constraints of the Fourteenth Amendment. This is a maddening case in its shameful avoidance of the real issue, and its weakly-reasoned legal conclusions. The tightly-reasoned lower court decision (which found in favor of Greene)[9] holds much more appeal for the thoughtful lawyer. I strongly advise you to read it. It shows how easily the same facts can be interpreted to yield a different result.

Another recent case, **Grossner** vs. **Columbia University**[10] is disappointing for the same

reason. In this case, the court found the requirements of "due process" did not apply to Columbia University because it received only 30 percent of its operating capital from government sources, and because the state took no hand in designing or enforcing the school's rules regarding student discipline. The court's last observation is stretching the point a bit, because I am unaware that the state participates in the formulation or enforcement of disciplinary rules at Alabama State College,[11] Bluefield College,[12] or Central Missouri State College.[13] Yet, all of these institutions have been brought under constitutional compulsion to afford due process to their students.

What is significant, however, is that the **Grossner** court recognized the matter of "state action" is one of **degree.**[14] If 30 percent public funding is not sufficient to constitute "state action" one is left to conjecture whether 35 percent might be.

The point I wish to make here is **not** that the courts have reversed the **Anthony** principle. As nearly as I can tell, they have not. But they have whittled away at it, until not one court is willing to say that Columbia University or Howard University are purely private institutions. Instead, they feel compelled to justify this conclusion with a whole host of facts the **Anthony** court would have considered irrelevant; a collection of facts upon which reasonable men--and courts--may differ; and, a collection which shows upon close examination the increasing lameness of the "private" college argument.

There are clearly cracks in the private college fortress. A federal court in Alabama has already extended the right of procedural due process to students attending **public** colleges, thereby insuring them that they would not lose their valuable right to a higher education without adequate notice, and a hearing on the facts.[15] Seven years later, in a special opinion, a Federal District Court in Missouri made prominent mention of the great value of a higher education, without limiting their observation to public schools.[16]

How long can so-called "private" institutions of higher learning hold themselves separate from, and exclusive of, public institutions while failing to protect their students' valuable rights to a higher education? My feeling is that this distinction cannot last much longer. But the more important question is, "Why not?" What has caused, or is causing, the erosion of the public/private distinction?

The principal reason, I would submit, is that there is no longer any such thing as a **purely** "private" college or university. All of them are involved in "state action" in one way or another. Consequently, all are brought within the proscriptions of the Fourteenth Amendment with regard to "due process" and "equal protection of the laws." The courts have indicated, however, that a finding of "state action" must be based on the peculiar facts of the case.[17] They have further said that such a finding is the sum of many factors. The general test, as announced in **Shelley** vs. **Kraemer,**[18] is whether it can be **fairly** said that "state action" is involved.

An excellent example of the process which courts follow in state action cases may be found in a 1962 case involving alleged discrimination at Tulane University.[19] The court first indicated the general test, then proceeded to examine the factors which might lead to a finding of "state action," e.g. public funding, state-appointed trustees, and tax exemptions. The court found no state action in this case, but the mere fact that they found it necessary to examine and weigh the evidence

indicates that the state action argument had a healthy chance of success.

Greene vs. **Howard University** is often cited for the proposition that there is no state action involved in the operation of a "private" university. As I pointed out before, the court did not deal effectively with the state action question in this case. But, they did note "the amenability to constitutional commands of what was once widely assumed to be purely private activity is a fluid and developing concept."[20]

A more significant case to the development of a theory of "state action" at "private" institutions is the 1963 case, **Simkins** vs. **Moses H. Cone Memorial Hospital.**[21] In this case, it was held that a private institution (in this case, a hospital) does not have to be regarded as the agent or instrumentality of the state for there to be "state action." Of course, the issue here was the segregation of a federally-supported hospital facility subsequent to the **Brown** decision. While the court readily conceded that the hospital was private in nature, they still had no difficulty in finding sufficient "state action" to apply the "equal protection" clause of the Fourteenth Amendment. I still believe that if the **Greene** case had involved racial discrimination in the admission process, rather than a lack of due process in the expulsion process, that--with over 50 percent federal funding--the court would have found "state action."

What then are the specific tests for "state action"? The first factor which every court considers is the tremendous flow of public funds to the campus. There are few institutions in the country which are not dependent to some degree on public funding. For the fiscal year 1971 alone, the Department of Health, Education, and Welfare has been allocated $973,239,000 for expenditures relating to higher education. Of this amount, $143,454,000 will be spent on Institutional Assistance, and $57,350,000 on College Personnel Development. An additional $9,300,000 has been appropriated to the Department of Housing and Urban Development for debt service, subsidies and loans related to college housing construction.

In truth, the largest portion of the HEW appropriation, $768,535,000, goes to student assistance. But, I see no reason why a student receiving federal assistance should have to attend a public school, or, failing that, sacrifice certain constitutional protections as the price of entering a private school: a school which might benefit as much as he from the public assistance which he receives.

In the next fiscal year, of course, all of these figures are likely to increase. I use them here only to illustrate what we already know: that the infusion of federal and other public monies into higher education is already massive, and is increasing every year.

To date, however, most courts have held that the receipt of public money alone is not sufficient to demonstrate "state action." This view is likely to control in the immediate future, but it becomes less important when one remembers that courts consider "state action" to be an aggregate of many factors. The receipt of public money is just one. Although the receipt of public money alone may not be persuasive, it has clearly weighed heavily in all court discussions to date. As the financial plight of private universities becomes more acute, and public monies form a larger percentage of the school budget; the courts may finally hold that the receipt of public money alone is sufficient to support a finding of state action.

It would also be well to remember that Congress has the power to condition the receipt of federal funds, quite apart from any consideration of state action. Equal employment opportunity on federally-funded construction projects is one such example. It is quite obvious that the receipt of public money is heavily contigent upon the assured protection of constitutional rights. Again, I can only conjecture whether "state action" would have been found in the **Greene** case if it had involved racial discrimination rather than student due process.

An example of the court's willingness to stretch a point in order to bring certain types of private behavior under its pervue can be most clearly seen in **Simkins** vs. **Moses H. Cone Memorial Hospital**, a case which I mentioned earlier. In that case, a number of black doctors, dentists, and patients were suing for admission to two private, segregated hospitals which had obtained federal funding for construction projects under the Hill-Burton Act. Although the court readily conceded that the hospitals were "private" in nature, and did not become agents of the state as a result of public funding, still they found the necessary state action and ordered the hospitals to integrate pursuant to the Fourteenth Amendment.

How did the court find "state action"? The best and simplest answer is that they **wanted** to. For one thing, the integration of public-service facilities is a burning contemporary issue. In addition, health service facilities are just too important to the general public not to be underwritten by the government. If private hospitals are going to accept government underwriting, then they are going to have to treat all citizens equally. Certainly the 50 percent government participation in the construction of one hospital, and 17 percent participation in the construction of the other is no greater basis for a finding of "state action" than existed in either the **Green** or **Grossner** cases. Clearly the reason that the court found "state action" in the **Simpkins** case but did not in the other two was the fact that the issue of segregation is just a little more burning in the public mind and the court was just a little more eager to reach it.

If that be so, then one can only wonder when the time will be ripe for a similar decision in the private college-state action area.

One can hardly imagine two areas of activity more closely aligned with the public conception of well-being than health services and education.

Dixon and its descendents have already extended the constitutional protections of the **Simpkins** case to students attending **public** colleges and universities. Other cases have carried a similar precedent into the area of welfare rights.[22] These clearly-expressed judicial concerns tightly bracket the current status of students attending **private** colleges and universities. How much longer the public-private distinction can remain viable in the face of mounting public and judicial concern is genuinely questionable.

It seems almost too obvious for comment that society as a whole has a definite interest in the amount of education available to its members, both in extending material benefits to more persons, reducing welfare rolls and generally increasing the quality and security of life in this country. Anyone who pays taxes which support welfare and poverty programs should have a vested interest in phasing out these programs which command so much of our tax dollar. I know of no activity more likely to achieve these ends than a far-reaching program of higher education. That is to say that any taxpayer whose payments contribute to the furtherance of higher education in this

country--be it public **or** private--has an interest in the proper conduct of that education.

I have attempted to document the heavy financial support already permeating higher education--public and private. But this is not the limit of the interaction between public agencies and private colleges. Other points of interaction are conveniently at hand for any judge who needs them to justify a finding of "state action." For example, a court may simply find that private universities are performing a function which is normally charged to the state--education. Consequently, "state action" is to be inferred in the operation of **any** educational institution. This is not to say that the state or federal government will dictate educational policy to private, or even public, colleges. The **dicta** in every case studied indicates that academic matters will remain the unique province of the university. It may be desirable to guarantee private college students the same rights they would enjoy if they were attending a public institution, however.

It is already popularly accepted that primary and secondary education is a public function. As the **per capita** attendance at institutions of higher education continues to spiral, the courts may well find that education beyond the secondary level is a public function as well.

In 1971, over 7.5 million students enrolled in nearly twenty-six hundred colleges and universities in the United States. You know better than I that these figures will continue to escalate.

With over 50 percent of this nation's youth involved in some form of higher education, it is whistling in the dark to suppose that the state and federal governments, which spend millions fo dollars annually on their education, will not take some close interest in it. Whatever affects a substantial portion of the population becomes a matter of public interest, and whatever becomes a matter of public interest soon becomes a matter of public involvement.

Another connection between the public sphere and private colleges involves public taxation. Both state and federal governments extend a number of tax advantages to both public and private universities, advantages which are simply not available to other institutions. While this fact alone does not imply "state action," it is another government-institutional connection available to any judge who is eager to find it.

In a recent Supreme Court case, a private restaurant owner was held to be involved in "state action" simply because his establishment was located on, and enjoyed the business of persons using, a public parking facility operated by an agency of a municipal government.[24] This decision is certainly not far removed from any institution which has enjoyed the power of eminent domain, which rests in whole or in part on public land, or which enjoys a favorable tax advantage with regard to real estate.

Another public connection rests in the fact that most private colleges are chartered by the state in which they do business. It is doubtful that any court will consider the mere fact that a private university obtains a state charter evidence of "state action," but it does demonstrate that the state has some interest in their activity, and some method by which to control it. The public chartering requirement does not mean, of course, that a private institution has become public for all purposes. The private institution retains its character as such. But, the chartering power may provide a vehicle for inferring state interest--and state action--or just for extending constitutional safeguards to private colleges. It was exactly this power which produced a novel observation

by a Missouri federal court to the effect that a university's proscription of constitutionally-guaranteed rights might be beyond the scope of their charter, and therefore illegal.[25]

State action may also be inferred from the presence of state-appointed trusteees, or accrediting procedures, because they exhibit a clear state interest in the educational process. This matter has been commented upon by several courts, although none have found it to be determinative of the issue.[26]

Finally, I want to suggest that private institutions of higher education may come to be regarded as public utilities. This is a somewhat novel theory, but not so novel that it has not been suggested by other authors as well.[27] "Public utility" may be defined as a public use or a service to the public.[28] I cannot imagine a more appropriate description of educational institutions. With more than 50 percent of our college-age population enrolled, institutions of higher education are rapidly taking on the high public use factor which is characteristic of public utilities. A university is not just an environment in which ideas are transmitted, but where values are shaped and physical and social problems are solved: it is a provider of medical care and legal services, and a rich source of high-level consultation for both government and industry. In the words of one author: "The university has become the gatekeeper to the workaday world."[29]

It may be argued, of course, that higher education is not available to all consumers. I would argue that not all of our citizens are consumers of airline services either, and yet it is clearly a public utility. A highly regulated public utility, I might add--in the public interest. Although not all citizens are direct consumers in the higher educational market place, I cannot believe that there is a single person in this country who is unaffected by what goes on there.

The public has too big a stake in higher education--financially and otherwise--to allow it to become the jealous possession of a select few, or to allow the precious funds allocated to it to be carelessly spent, or squandered on duplicative facilities or competitive programs. Equally important, the public has a right to insist that vital public services--such as medical care and legal service--be adequately provided for by these educational institutions.

It may prove more desirable for state and federal governments to continue to license and fund private colleges rather than let them expire out of financial hardship, or build competing institutions from scratch. If this view be taken, then it follows that the protections available to students at public schools should be equally available to students at private schools, which operate in lieu of public schools, and at the government's sufferance. In other words, the Fourteenth Amendment should be as available to protect students against the arbitrary actions of private institutions as it would be to protect them against the government itself. In fairness, the effect upon the student should be the same whether he attends a public institution or private institution, which is performing the same task.

In the preceding paragraphs, I have illustrated a number of ways in which public agencies are involved in the operation of private universities. Involvement which, in my opinion, constitutes sufficient "state action" to allow courts of law to extend the protections of the Constitution to students attending those schools. On the other hand, I have said that federal district and appeals courts have--to date--shied away

from finding "state action" in the operation of private schools. How do I intend to bridge the gap?

The answer derives from two sources: first, changing public attitude toward higher education; and second, a well-established treatise on judicial behavior.

I have already mentioned a growing feeling within our society that higher education is a prerequisite to material well-being and personal fulfillment. The opportunity to obtain a bachelor's degree, or advanced degrees, is so valuable that it ought not to be denied--or withdrawn--without careful scrutiny of the reasons therefor. As our technology advances, and the gap between the educated and ill-educated becomes greater, public interest will dictate equal treatment for all students--regardless of the nature of the institution they attend.

In keeping with public interest, but cloaked in the inscrutable logic of the legal mind, is the second element--that of judicial behavior. Many persons have tried to describe this process, but probably none so successfully as Benjamin Cardoza in his famous treatise on the **Nature of the Judicial Process.** Justice Cardoza appreciated the value of custom and precedent in shaping the law.[30] But, he also appreciated that there were times when the judiciary must depart from well-established legal precident in search of a just result. Thus, he wrote that "when . . . social needs demand one settlement rather than another, there are times when (one) must bend symmetry, ignore history and sacrifice custom in the pursuit of other larger ends."[31]

Justice Cardoza felt that "the final cause of the law is the welfare of society," and that although "judges are (not) commissioned to set aside existing rules at (their) pleasure . . . they are called upon to say how far existing rules are to be extended or restricted and they must let the welfare of society fix the path, its direction and distance."[32]

There is little doubt that Cardoza's theory was operating when the **Brown** court reached out to reverse over fifty years of "separate but equal" precedent. The principle was also operating when the **Dixon** court extended procedural due process to **public** college students in university disciplinary proceedings; and when the Federal District Court for the Western District of Missouri sat en banc to amplify and extend the **Dixon** rule. Cardoza's principle was also operating when the **Simpkins** court extended the **Brown** ruling to the health care field, even though the court expressly noted in that case that the defendants were operating "private" hospitals.

Far from rusty and tired, the principles of judicial creativity enunciated by Justice Cardoza in 1921 are alive and well in these recent landmark decisions.

This is the "nature" of the judicial process. To legislate, if necessary, in order to achieve **just** ends. And I have already shown that there are many theories available to any judge who would wish to equate private schools with "state action" in matters involving students' rights.

I certainly do not think it "just" to dismiss private college students from their opportunity for a higher education without either process or hearing. Universities are no more free of "rumor," "misapprehension" or "falsehood" than society as a whole. This fact was recognized as long ago as the first **Anthony** case.[33] The same court recognized that "dismissal (from college) was pregnant with consequences which may spell the ruination of

a life."[34] It will not take the courts forever to realize this, or to recognize that the distinction which currently exists between the legal process required of public and private colleges is not in the best interests of society. When an enlightened judge finally decides to find state action in the operation of a private institution he will have no difficulty in doing so.

Cardozo's approach is aided by the fact, however, that there is little reason to justify the continued maintenance of a public/private distinction in the area of student rights. It has little basis in logic; it is normally availed of only in those situations where it is expedient to the institution's needs in a given case. In an oft quoted article, Professor Charles Alan Wright has written that "it seems . . . unthinkable . . . in the turbulent atmosphere to today's campus . . . that the faculty and administration of any private institution would consider recognizing fewer rights in their students than the minimum the Constitution exacts of the state universities, or that their students would long remain quiescent if a private college were to embark on such a benighted course."[35]

I am not contending that all institutions of higher learning in this country are homogeneous, or that their disciplinary codes and rules of expression ought to be identical. I believe that each campus should be free to establish its own rules and regulations so long as they are guided in this endeavor by the wisdom of the Constitution. The highly artificial distinction between public and private colleges should not be a barrier to this end.

The preamble to the **Joint Statement on Rights and Freedoms of Students** recognized that "Institutional procedures for achieving these purposes may vary from campus to campus," but averred that "minimal standards of academic freedom of students . . . are essential to any community of scholars."[36] Although this **Statement** was the work product of representatives from many different associations including administrators, faculty and students, it is interesting to note that there is not one mention of a public/private distinction. A lengthy **Report of the American Bar Association Commission on Campus Government and Student Dissent** mentions the distinction only in passing.[37]

Part of the reason for these omissions is, of course, that there are many more reasonable distinctions upon which to categorize colleges than their public or private nature. Well-established variations in size and location are much more defensable.

It is to be expected that a rural campus will have rules which differ from its urban counterpart. A resident campus will have a different code of conduct and mode of adjudication than a commuter campus simply because the nature of the social and intellectual life of each is different. The same would be true of a large, complex multiversity in contrast to a small one-college campus. Obviously, the concept of private college/public college cuts across all of these features without much discrimination.

We need not explore all the ramifications of these distinctions now. It is sufficient to note that many legitimate distinctions do exist between schools and that any of them provides a better basis for separate codes and procedures than a distinction based solely on the private or public nature of the institution.

In other words, differences in codes of student behavior should be consonant with the nature and objectives of a university, not the result of an historical half-accident which saw one school founded public and another private.

For those of you who seek more guidance in the development of student codes of conduct, I suggest you consult two excellent law journal articles––a classic by Warren Seavey,[38] and one by William Van Alstyne;[39] the **Joint Statement on Rights and Freedoms of Students;**[40] the **Report of the American Bar Association Commission on Campus Government and Student Dissent;**[41] the holdings in the **Dixon**[42] case, and the **Missouri**[43] order; a brief report published by the New York University Law School on student conduct and discipline proceedings;[44] and an excellent monograph authored by D. Parker Young of this Institute.[45] Finally, you should adhere to the commandments of the United States Constitution and its amendments; you will need some conscience and restraint; and you must seek the advice of students and their assistance.

One final point. My theme that student rights on college campuses should not depend upon a public school/private school distinction is not capable of blanket application. There are at least two exceptions. A private college––particularly one with limited public ties in terms of those which I have mentioned––may reserve to itself many rights by contract. But the students' rights which that school reserves should be clear and explicit, and be brought emphatically to the student's, and his parents' attention. They should not be couched in overly broad terms and buried on a registration card which every student signs without a second thought, as they were in the **Anthony** case. It is my belief that a private school which requires an unreasonable amount of liberty in dealing with its students is not only biting off more than it can chew, but will soon find itself running short of high-quality students who are willing to sign their repressive "contract."

A second situation which I believe would justify the circumscription of certain students' rights would be the existence of a peculiar curricular or residential program, which would simply not operate if students were given the full rights associated with less-structured programs. A total immersion program is one example. But the circumscription of rights in these programs should be fully publicized and fully merited by the requirements of the program. Naturally, they would apply equally to public and private schools which have such programs. And, again, the attraction of first-rate students to these restrictive programs in an enlightened age may prove to be something of a problem.

I have not told you these things to frighten you, but to warn you. This should not be necessary if yours is a conscientious and self-evaluative institution in step with the times. No school should pride itself on the fact that it has **merely** conformed to the latest court ruling concerning the rights of students. Institutions of higher education are known and valued in our society for their progressive contribution to it. It is hardly progressive to see a college dragged kicking and screaming into court just to enforce minimum due process and First Amendment freedoms for its students. This behavior does damage to the school involved, and to higher education everywhere.

This is not the sensitive reaction to changing social values and needs which Cardozo prescribed for the American judiciary. And it is not the progressive role for which education––particularly **higher** education; and I daresay, **private** higher education––has been noted in our society. I would hope that this notable contribution and reputation will not be damaged by anything at once so obvious––and so trivial to the overall life of the institution––as adequate rights for students.

FOOTNOTES

1. **Brown** vs. **Board of Education of Topeka,** 347 **U. S.** 483 (1954).
2. U. S. Const. Amend. XIV. S1.
3. 109 **U. S.** 3 (1883).
4. **Shelley** vs. **Kraemer,** 334 **U. S.** 1 (1948).
5. **Burton** vs. **Wilmington Parking Authority,** 365 **U. S.** 715 (1961).
6. **Anthony** vs. **Syracuse University,** 224 **App. Div.** 487, 231 **N. Y. S.** 435 (App. Div. 1928).
7. 412 **F.** 2d 1128 (D. C. Cir. 1969).
8. 294 **F.** 2d 150 (5th Cir.), **cert. denied,** 368 **U. S.** 930 (1961).
9. **Greene** vs. **Howard University,** 271 **F. Supp.** 609 (D. D. C. 1967).
10. 287 **F. Supp.** 535 (S. D. N. Y. 1968).
11. **Dixon** vs. **Alabama State Board of Education,** 894 **F.** 2d 150 (5th Cir. 1961), **cert. denied,** 368 **U. S.** 930 (1961).
12. **Barker** vs. **Hardway,** 283 **F. Supp.** 228 (S. D. W. Va. 1968).
13. **Esteban** vs. **Central Missouri State College,** 290 **F. Supp.** 622 (W. D. Mo. 1968).
14. **Grossner** vs. **Columbia University,** 287 **F. Supp.** 535, 548–49 (S. D. N. Y. 1968).
15. **See** note 11, **supra.**
16. General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Learning, 45 **F. R. D.** 133 (W. D. Mo. 1968).
17. **Burton** vs. **Wilmington Parking Authority,** 365 **U. S.** 715, 722 (1961); **Simkins** vs. **Moses H. Cone Memorial Hospital,** 323 **F.** 2d 959 (4th Cir. 1963), **cert. denied,** 376 **U. S.** 938; **Grossner** vs. **Columbia University,** 287 **F. Supp.** 535, 548 (S. D. N. Y. 1968).
18. 334 **U. S.** 1 (1948).
19. **Guillory** vs. **Administrators of Tulane University,** 212 **F. Supp.** 674 (E. D. La. 1962).

20. **Greene** vs. **Howard University,** 412 **F.** 2d 1128, 1131 n. 2. (D. C. Cir. 1969).

21. 323 **F.** 2d 959 (4th Cir. 1963).

22. **See** 19 De Paul L. Rev. 552 (1970).

23. **See** note 19, **supra.**

24. **See** note 5, **supra.**

25. General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Learning, 45 **F. R. D.** 133 (W. D. Mo. 1968). This finding was directed at "tax supported schools," however.

26. **See** note 19, **supra.**

27. Corson, **Social Change and the University,** LII, no. 2 Saturday Review 76 (1970).

28. **Motor Cargo, Inc.** vs. **Board of Tp. Trustees of Richfield Tp.,** 117 **N. E.** 2d 224, 225–26 (Ohio C. P. 1953).

29. Corson, **Social Change and the University,** LII, no. 2 Saturday Review 76 (1970).

30. B. Cardozo, **The Nature of the Judicial Process** (1921).

31. **Id.** at 65.

32. **Id.** at 66–67.

33. **Anthony** vs. **Syracuse University,** 130 **Misc.** 249, 223 **N. Y. S.** 796, 808–9 (Sup. Ct. Onondaga Cty. 1927).

34. **Anthony** vs. **Syracuse University,** 130 **Misc.** 249, 223 **N. Y. S.** 796, 802 (Sup. Ct. Onondaga Cty. 1927).

35. 22 **Vand. L. Rev.** 1027, 1035.

36. American Association of University Professors, Joint Statement on Rights and Freedoms of Students (1970) (Summer Bulletin).

37. American Bar Association, **Report of the American Bar Association Commission on Campus Government and Student Dissent** (1970) **(unpublished draft).**

38. Seavey, **Dismissal of Students: Due Process,** 70 Harv. L. Rev. 1406 (1957).

39. Van Alstyne, **Procedural Due Process and State University Students,** 10 U. C. L. A. L. Rev. 368 (1963).

40. **See** note 36, **supra.**

41. **See** note 37, **supra.**

42. **See** note 11, **supra.**

43. **See** note 16, **supra.**

44. New York University School of Law, **Student Conduct and Discipline Proceedings in a University Setting** (1968).

45. Young, **The Legal Aspects of Student Dissent and Discipline in Higher Education** (1970).

ACADEMIC FREEDOM AND DUE PROCESS IN THE CLASSROOM

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In these times, when we see almost every group in this country demanding that their desires be granted, we see protest through civil disobedience and other tactics. The list of groups is long and ranges from civil rights to firemen, policemen, teachers and other government workers. Many, if not most of these parties, have violated laws, even court orders in their efforts to have their demands met. And again, many, if not most, have at least in some measure had a part of their demands granted and in numerous cases, without any real punishment as a result of having broken laws or violated court orders.

Against this background it is easy to understand why college students have carried on some of their protests. The successes scored by adults in the various organizations to which I referred have certainly given students the blueprint for action and a high degree of expectancy for success by their actions. Since youth is the age of rebellion, quite naturally their normal inclinations will have been given an added spur by the events of the past decade.

Youth is also idealistic. Young people see things as either right or wrong and seldom will exhibit any tolerance for the possibility of the existence of any middle ground. They see the abundance of hypocrisy in our society--in government, in the church, and in the home. They see parents with a cocktail in one hand and a cigarette in the other telling them not to experiment with drugs. And no matter how we try to explain this, a sizable number of young people simply do not accept our reasoning. But, more pointedly to the interests of this group today, they see in all too many of our colleges and universities an outward declaration of dedication to the student as an individual while, in actual practice, students have become numbers in an impersonal organization. Additionally, they discover that a large number of professors are more dedicated to their research and publication than their students, since this is what determines professional rewards in many instances.

The campus has become a focal point of protest by students who seek changes in our society. Changes which, for the most part, cannot be affected by a single educational institution. And quite frankly, changes in many cases which, if affected by the institution and if the institution lent its official approval and energies to, would simply politicize the institution and thus doom its being a viable free marketplace of ideas.

Our system of government in this country is one which fosters an open forum and even

dissent. The open forum is an absolute necessity for individual freedom. But so long as the means for change, even total change, exists within the system then there can be no tolerance for lawlessness and violence.

Our colleges and universities bear a tremendous burden in the maintenance of freedom not only within those institutions but throughout our society as well. If any free society is to remain free it must protect its educational institutions as they search for the truth––as they constantly inquire and debate––as they remain the free marketplace of ideas. Academic freedom must be the foundation of these institutions. But I would hasten to add it must exist hand-in-hand with academic responsibility. To allow the erosion or abandonment of the free marketplace of ideas is simply to yield to the pressures of the moment.

The majority of American citizens reject the notion of a politicized educational institution. They will not support such an institution nor will they tolerate the existence of such a public institution.

Courts have protected academic freedom. They have resisted the opportunity to interfere with the academic aspects of colleges and universities. I think, however, that courts may be persuaded to interfere to lend their support in efforts to force academic responsibility on the part of those who would abuse academic freedom.

I think it is fair to say that in the past decade we have seen, in some instances, the erosion of a strong, free marketplace of ideas and a lack of academic responsibility. Some have assumed the campus to be a sanctuary and have hidden behind academic freedom to pursue aims and objectives other than those compatable with a college or university.

Faculty members have the same rights of speech and assembly as do all citizens and certainly they may not be dismissed for the exercise of their constitutional rights. However, I think it is clear that they will increasingly be made accountable for their actions inside, as well as, outside the classroom in so far as maintaining the integrity of the educational institution is concerned.

There is abundant evidence to show the increasing concern for academic freedom and academic responsibility; I stress the latter. Even the AAUP has recently urged its own members to live up to their responsibilities to uphold academic freedom. In a statement calling upon faculty members to take the initiative in maintaining the free marketplace of ideas and respect for the academic rights of others, the AAUP made these points:

> The expression of dissent and the attempt to produce change . . . may not be carried out in ways which injure individuals or damage institutional facilities or disrupt the classes of one's teachers or colleagues.
>
> Faculty members may not refuse to enroll or teach students on the grounds of their belief or the possible uses to which they may put the knowledge to be gained in a course.
>
> It is improper for an instructor persistently to intrude material which has no relation to his subject, or to fail to present the subject matter of his course as announced. . . .[1]

The Model Bill of Rights and Responsibilities by the Carnegie Commission included the following statement which again evidences concern for academic freedom and academic responsibility:

> Freedom to teach and to learn implies that the teacher has the right to determine the specific content of his course, within the established course definition, and the responsibility not to depart significantly from his area of competence or to divert significant time to material extraneous to the subject matter of his course.[2]

I would like to suggest the possibility that courts may entertain suits against professors who have misused the classroom and thus allegedly violated the rights of students. The 1871 Civil Rights Act, which allows suits for damages in federal courts against any person acting under color of state law, custom, or usage who causes the protected rights of another to be violated, appears to have been discovered recently and is now the basis for suits against administrators for abdication of their responsibility in allowing the institution to be closed or to become politicized. This act, as well as the contractual relationship between a student and the institution, may possibly allow for suits against professors who misuse their classroom or grade a student in an arbitrary or capricious manner.

Up to this time there have been confrontations on the campus primarily between students and administrators. Many times these confrontations have concerned issues beyond the institution and over which its administrators have no control. With confidence, one may predict that there will be increasing confrontations on campus between students and faculty concerning the areas of instruction and arbitrary student evaluation. Academic freedom will indeed be examined with the same scrutiny as has been given administrative policies and decisions.

To deny the possibility of arbitrary or capricious academic evaluation is simply to be out of touch with the reality of today's colleges and universities. The pressures on contemporary professors for research and publication leave less and less time for attention to teaching responsibilities. Of course, the true community junior college, by its very nature a teaching institution, does not present the pressures on faculty that exist in universities and many four-year colleges. But it is also true that, in general, these campuses have not had the violence and the disruption that has occurred on other campuses. Certainly there are other explanations for this fact, but it is also clear that the emphasis on teaching and the stated purposes of those institutions give impetus toward the professor's dedication to the student and his learning.

Certainly students are aware of the existence of conditions in higher education which could result in the arbitrary assignment of grades. If one examines the historical development of student discipline, it is evident that students know their rights and are willing to go to court to obtain relief when those rights are violated. Furthermore, there are many organizations willing and ready to support students in their legal struggles. Supporting evidence for this view may be obtained by merely perusing the legal reporting system since the **Dixon** vs. **Alabama State Board of Education**[3] case in 1961.

There is little doubt that students will force the implementation of "due process" procedures in the classroom. As early as 1968 the president of the United States National Student Association sounded a warning when he stated that campus confrontations would continue until and unless higher education faced up to the "new issues." One such "new issue" included grading policies.[4]

Most college administrators are familiar to some extent with due process as it applies to student

discipline; however, little attention has been given to incorporating this concept in matters affecting scholastic affairs. Basically, the lack of due process in the classroom derives from a misunderstanding of the process by academic administrators, who view it as a concept dressed in legal detail and unsuited to the academic enclave. This misconception then leads to the notion that since scholastic evaluation is the sole prerogative of the professor, due process would be misplaced in academic evaluation.

There are, in fact, two types of due process--procedural and substantive. Procedural due process refers to the established procedures available to carry out and enforce regulations or standards. Substantive due process, on the other hand, examines the very nature of the standards. Is the standard or regulation fair, reasonable, or just?

It must be recognized, however, that to state precisely what constitutes due process is impossible.[5] The courts have preferred to define the concept "by the gradual process of judicial inclusion and exclusion."[6] It is obvious that colleges are not courts, and academic deans are not prosecutors; however, both can provide clearly defined and disseminated requirements and procedures to ensure fair play, thus satisfying both procedural and substantive aspects of due process.

Certainly no one would deny the professor's right to establish standards of academic performance and to evaluate a student's progress in meeting those standards. Even the courts have clearly enunciated the principle of judicial non-interference in academic assessment. In the case of a medical student who failed courses in his third year and who was refused continuance at the university, the Federal District Court stated:

> . . . in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals.[7]

There are, in addition to that case, other court decisions which uphold the principle of judicial non-interference.[8] The important point, which unites scholastic affairs and due process and which is often overlooked, is that students at a tax-supported state institution have a consitutional right to due process when action which materially injures them is arbitrary, capricious, in bad faith, or is discriminatory in its application. The fact that a student is materially injured by being excluded from higher education has been well documented. As early as 1954 the United States Supreme Court, in reference to importance of education, stated in the landmark case **Brown** vs. **Board of Education** that:

> Today education is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[9]

In the case of the medical student mentioned earlier, the Federal Court also said,

> . . . should the plaintiff (student) prevail on the issue of whether the defendent (university) acted arbitrarily, capriciously, or in bad faith, this Court will then order the defendent University to give the plaintiff (student) a fair and

> impartial hearing on his dismissal order.[10]

The obvious implication of this statement by the court is that due process would be required in cases of arbitrary or capricious evaluation.

Legal proceedings, leading to a loss of institutional autonomy, are neither necessary nor desirable for higher education. Higher education today is faced with the axiomatic truth that where it does not establish procedures for self-government, it will be governed by others. This principle has been clearly enunciated by Yegge in his plea "Wanted: Architect for Continued Autonomy."[11] Clearly established and publicized procedures guaranteeing students the protection of due process where there is arbitrary or capricious evaluation or where academic assessment is discriminatory in its application must be provided within the academic community. Anything less, or a failure to recognize students' rights within the context of academic evaluation, can lead to the encroachment of non-educational agencies into the area of scholastic affairs. Once this path is open, it may be difficult to draw the line between the rights and privileges of students and those of the professor.

Distinctions made between the concept of due process as applied to disciplinary cases and scholastic affairs are merely fabrications. In this regard it is interesting to note that the **Joint Statement on Rights and Freedoms of Students** describes in elaborate detail aspects of "Procedural Standards in Disciplinary Proceedings." In the discussion of student rights "in the classroom," located in the section entitled, "Protection against Improper Academic Evaluation," it is simply stated that "Students should have protection through orderly procedures against prejudice or capiricious academic evaluation."[12]

Although the courts do not specify precisely what constitutes due process, there are elements of fair play which can be implemented with no attendant loss of the professors' privileges or institutional autonomy. I would now like to recommend some. These elements should not be construed as specific prescriptions to cover every case, but rather, as guidelines.

1. Academic requirements for continuance and graduation should be clearly specified and publicized.

2. Standards for evaluating students' classroom performances should be precisely stated for each course, preferably in writing, no later than the first class meeting. These standards should clearly set forth the procedures and methods to be used by students in turning work in, the penalty for failure to meet the deadline for turning work in, the exact grading procedure, and the weighing of various assignments for grading purposes.

3. A well-defined and unambiguous defintion of plagerism should be disseminated to all students.

4. Students suspended for cheating or plagerism should be afforded notice and an opportunity for a hearing. The hearing itself should conform to the standards of due process as required by courts for disciplinary proceedings.

5. A well-documented and orderly procedure of appeal should be established and promulagated for cases involving academic assessments which are allegedly based upon other than academic grounds and which can be clearly shown to be injurious to the student in his academic career.

A committee should be appointed in each department (or a single committee for the college if this is deemed more feasible) which would hear complaints by students against faculty members for alleged misuse of the classroom and/or arbitrary grading practices. After a successful showing by the student before this committee, the professor against whom the allegations have been made should be given all due process rights in defending his actions.

The implementation of these recommendations would not, in my opinion, open a Pandora's box with a proliferation of student complaints against professors. Rather, I believe that faculty members would tend to re-think and update their course content, requirements, and grading procedures. Students would more clearly understand what is required of them. The committee to hear complaints would merely formalize a fair and reasonable procedure which is now an informal one with no structure which nurtures distrust and disrespect. I believe an appreciation of the rights and responsibilities of faculty members and students would be served by the implementation of these guidelines. I, also, believe that the quality of instruction would be improved under such circumstances.

Only by recognizing the legitimacy of due process as it relates to academic concerns and by providing for its inclusion in academic procedures, can higher education hope to retain its autonomy and integrity. It is really a call for a refocusing of the true aims and purposes of education institutions and for an appreciation of the worth and dignity of each individual. It may be that major surgery of the higher education structure is needed. To be sure, individual rights and academic freedom need to be protected if the free marketplace of ideas is to survive.

FOOTNOTES

1. "A Statement of the Association's Council: Freedom and Responsibility." **American Association of University Professors Bulletin,** Vol. 56, No. 4 (Winter Issue), December, 1970, pp. 375–376.

2. **The Chronicle of Higher Education.** March 15, 1971.

3. 294 **F.** 2d 150 (1961).

4. Schwartz, E. Comment. 45(4), **Denver Law Journal,** (Special 1968), p. 526.

5. Young, D. **The Legal Aspects of Student Dissent and Discipline in Higher Education.** (Athens, Georgia: Institute of Higher Education, 1970), p. 19.

6. **Ibid.**

7. **Connelly** vs. **University of Vermont and State Agricultural College,** 244 **F. Supp.** 156 (1965).

8. **Mustell** vs. **Rose,** 211 **So.** 2d 489 (1968). **University of Miami** vs. **Militana,** 184, **So.** 2d 701 (1966). **Militana** vs. **University of Miami,** 236 **So.** 2d 162 (1970).

9. 347 **U. S.** 483 (1954).

10. Connelly, **op. cit.**

11. Yegge, R. "Wanted: Architects for Continued Autonomy." In Young, D. (Ed.). **Higher Education: The Law and Student Protest.** (Athens, Georgia: Institute of Higher Education and Center for Continuing Education, 1970).

12. Joint Statement on Rights and Freedoms of Students. **American Association of University Professors Bulletin,** Vol. 53, (1967), pp. 365–368.

CONSTITUTIONAL RIGHTS AND NON–RENEWAL OF FACULTY CONTRACTS

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I have been asked to discuss with you this afternoon the topic "Constitutional Rights and Non-Renewal of Faculty Contracts." This is a topic upon which there has developed a marked divergence of opinion among the federal appellate courts throughout the country. At the moment the rights of a faculty member in regard to the non-renewal of his contract of employment with a public educational institution appear to depend in large measure upon the geographic location in which he finds himself.

On June 14, 1971, the Supreme Court of the United States agreed to review one of the decisions of the United States Court of Appeals for the Fifth Circuit. Thus, we may anticipate that some time during the term of that Court which commences in October 1971 we may have a ruling from the United States Supreme Court which will have uniform application throughout the several states. But today I will discuss with you some of the apparently conflicting decisions which have come out of the intermediate federal appellate courts. My aim is simply to give you information about what the courts have said and not to criticize the holding of any particular court.

Inasmuch as the case that the Supreme Court has agreed to review arises out of the Fifth Circuit Court of Appeals, the law as it is developed in that circuit appears to be the logical starting point.

The opinions on the subject from the Fifth Circuit Court of Appeals require that we classify teachers in three separate categories: The first category is that of teachers who are on continuing contracts or who have otherwise by law or regulation attained a tenure status. The second category involves those faculty members who have neither a continuing contract nor tenure status but who because of actions of their employer have achieved an "expectancy of continued employment." The third category is made up of those teachers who have neither continuing contracts nor tenure nor the "expectancy of continued employment."

Under the decisions of the Fifth Circuit teachers in either of the first two categories occupy the same position and in order for their employment to be terminated it is necessary for the employer to give the teacher notice of cause for termination of employment and the opportunity for a hearing at which the teacher may refute the causes given by the employer. A case in point is that of **Ferguson** vs. **Thomas.**[1] In that case Prairieview A. & M. College terminated the employment of

Dr. William C. Ferguson. Dr. Ferguson did not hold tenure. It was in this case that the Fifth Circuit held that a college could create obligations as between itself and its instructors where none might otherwise exist under legal standards of interpretation of contract relationships regularly applied to transactions. This applied if the college adopted regulations or standards of practice governing non-tenured employees which create the expectation of reemployment.

The evidence adduced from the college officials established two major points of importance. First, they consistently denominated and treated their action in Dr. Ferguson's case as a termination of his employment rather than a dicision not to offer him a new or subsequent term of employment. Second, they conceeded that under prevailing practices, a decision not to offer such an instructor a renewal contract of employment required a showing of cause. The court held that their treatment was sufficient to create for Dr. Ferguson an expectancy of reemployment that required that his termination be accomplished under procedures which would accord him fundamental due process. The court pointed out that the rudiments of due process and fair play in school administrative proceedings have been well outlined in the Fifth Circuit with regard to the rights of college students who were subjected to disciplinary suspensions. That is, students are entitled to a statement of the charges against them, the names of witnesses, the nature of testimony of those witnesses, and the opportunity of presenting a defense. The court said that these same minimum standards are applicable to teachers who have an expectancy of reemployment.

In the same year that court decided **Lucas** vs. **Chapman.**[2] The court found that, although the faculty member had no tenure and his one-year contract had not been breached, his long employment in a continuing relationship through the use of renewals of short-term contracts was sufficient to give him the necessary expectancy of reemployment that constituted a protectable interest.

Prior to either **Ferguson** or **Lucas** the Fifth Circuit had in September 1969 rendered its decision in **Pred** vs. **Board of Public Instruction of Dade County, Florida.**[3] That case involved two teachers of Miami-Dade Junior College. Under Florida law, if a public school or junior college teacher has completed three years of annual contract service and is employed for a fourth year, such employment must be on a continuing contract.

The teachers involved in **Pred** had completed three years of employment with the junior college, but were notified that they would not be reemployed for a fourth year. The teachers brought suit in federal court. In their suit they did not claim to have tenure or to have the expectancy of continued employment. They were, rather, members of the third category mentioned earlier. In their suit, however, they claimed that the decision not to reemploy them was based solely upon the fact that they had been engaged in activities which were protected under the First Amendment to the United States Constitution. The trial judge dismissed the complaint and the teachers appealed.

The appellate court held that if the teachers were able to prove the allegations of their complaint, that they were not rehired solely because they had been engaged in activities protected by the First Amendment, they were entitled to relief.

The court said, "The right sought to be vindicated is not a contractual one, nor could it be since no **right** to reemployment existed. What is at stake is the vindication of constitutional rights--the right not to be

punished by the state or to suffer retaliation at its hands because a public employee persists in the exercise of First Amendment rights."

In August 1970 the Fifth Circuit, in **Sindermann** vs. **Perry,**[4] brought together its holding in **Ferguson** and its holding in **Pred,** recognizing the "**Pred** aligned this court with the Fourth Circuit and against the Tenth Circuit in this as yet unresolved conflict between circuits."

The court, in **Sindermann,** said that first "a determination must be made as to whether the teacher involved has tenure or an expectancy of reemployment under the policies and practices of the institution." If either of these be found to exist, then the teacher, prior to termination of employment, is entitled to notice of the reasons for termination and is entitled to a hearing in order that he may be afforded the opportunity to refute those reasons. Then the court said:

> On the other hand, if the Court resolves that Sindermann did not have an expectancy of reemployment which wduld require the college to show cause for the decision not to renew his contract, a different procedure would be indicated. In such a situation, upon receipt of notice that a new contract will not be offered, the teacher must bear the burden both of initiating the proceedings and of proving that a wrong has been done by the collegiate action in not rehiring him. It is incumbent upon such a teacher, not the college, to shoulder these responsibilities because the college may base its decision not to reemploy a teacher without tenure or a contractual expectancy of reemployment upon any reason or upon no reason at all. **Bomar** vs. **Keyes,** 162 **F.** 2d 136 (2nd Cir. 1947). **Cf. Smith** vs. **Board of Regents,** etc., 426 **F.** 2d 492 (5th Cir. 1970). A requirement such as plaintiff suggests, that a college must always assign a cause for not renewing the contract of any teacher on its staff, would have the legal effect of improperly denying to colleges freedom of contract to employ personnel on the probationary basis or under annual contracts which are unfettered by any reemployment obligation. Every teacher would thus be granted substantial tenure rights by court edict. Courts do not make contracts for colleges or teachers any more than for any other litigants.
>
> Upon receipt of the college's notice that it will not renew his contract, if a teacher determines to assert that such non-renewal is really a form of punishment for his exercise of constitutional rights or otherwise constitutes some actionable wrong, the teacher should notify the institution with reasonable promptness of his claim in sufficient detail to fairly enable the institution to show any error that may exist and request a hearing. Upon the receipt of this notice and request the institution should constitute a tribunal to conduct such a hearing that both possesses some academic expertise and has an apparent impartiality toward the charges.
>
> This hearing must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition. Of course the whole point of the academic process is lost unless the hearing affords a meaningful opportunity to develop a record which can, if necessary, later form a substantial part of any court proceeding--a transcript which should

> demonstrate that the academic tribunal based its decision upon matters adduced before it. This is not so just to accommodate court procedures. More importantly, it is the process best calculated to reach a fair accord and to settle the problems which have arisen between the parties. After all, the candid settlement of differences that arise between men is the essence of civil justice for which we strive."[5]

It is the **Sindermann** case that the United States Supreme Court has agreed to review.

As an example of the conflict between judicial circuits which has arisen, let us look for a moment at the decision of the United States Court of Appeals for the First Circuit in **Drown** vs. **Portsmouth School District.**[6] That court pointed out that the United States Court of Appeals for the Eighth Circuit, in the case of **Freeman** vs. **Gould Special School District of Lincoln County, Arkansas,**[7] had held that a teacher had no right to an administrative hearing, although he does have a legal remedy, if he was dismissed for constitutionally impermissible reasons, such as his race or the exercise of First Amendment rights. The First Circuit also pointed out that trial courts in Ohio and Wisconsin had held that a non-tenured teacher is entitled to a hearing even where there is no allegation that the decision not to rehire him was made for constitutionally impermissible reasons. Then it cited the Fifth Circuit's so-called "middle course" requiring administrative hearings only in the cases of teachers with tenure or the expectancy of reemployment or when there was an allegation that a constitutionally impermissible reason motivated the decision not to rehire.

In a footnote of **Drown** the First Circuit Court commented on the Fifth Circuit's holdings, as follows: "The Fifth Circuit distinguishes between non-tenured teachers who have an expectancy of reemployment and those who do not. Those with an expectancy of reemployment are entitled to the full procedural rights of a teacher with tenure. We are not impressed by this distinction. Almost every teacher, arguably at least, has such an expectancy, and we think a teacher has an interest in employment protected by the due process clause independent of the existence of this quasi-contractual right."

The First Circuit then went on to reach its novel solution to the problem. It held that a non-tenured teacher had an interest in knowing the basis for his non-retention, which interests were so substantial as to require a written explanation in some detail for the reasons for non-retention, together with access by the teacher to evaluation reports in his personnel file. The court found that this solution best served the interests of society in promoting a better school system and in protecting the rights of the individual and that no hearing was required.

In summary, then, I think it is safe to say that the following rules apply in teacher termination cases:

> In the case of the termination of employment of a faculty member with tenure or with a continuing contract that faculty member is entitled to full procedural due process.
>
> In some states, a teacher without tenure may be dismissed without procedural due process and without regard to the question of whether he has the expectancy of continued employment.
>
> In some states, a teacher without tenure or continuing contract, but with the

expectancy of continued employment, may be dismissed only after being afforded the same due process which should be accorded a teacher with tenure.

In some areas, a teacher without tenure is entitled to a hearing for the purpose of allowing him to prove his allegation that his dismissal was based upon constitutionally impermissible grounds.

In some areas, a non-tenured teacher is entitled to a hearing even where there is no allegation that the decision not to rehire him was based on constitutionally impermissible reasons.

Hopefully, the Supreme Court will soon remove what the Fifth Circuit has referred to as the unresolved conflicts between circuits.

FOOTNOTES

1. 430 F. 2d 852 (1970).
2. 430 F. 2d 945 (1970).
3. 415 F. 2d 851 (1969).
4. 430 F. 2d 939 (1970).
5. **Ibid.**
6. **Drown** vs. **Portsmouth School District,** 435 F. 2d 1182 (1970).
7. 405 F. 2d 1153 (1969).